(9)

No. 88-2074-CFX
Status: GRANTED

Title: Mark Frech, et al., Petitioners
v.
Cynthia Rutan, et al.

Docketed:
June 19, 1989

Court: United States Court of Appeals
for the Seventh Circuit

Vide:
88-1872

Counsel for petitioner: Sullivan,Thomas P.

Counsel for respondent: Leahy,Mary Lee

Entry	Date	Note	Proceedings and Orders
3	Jun 16 1989	G	Motion of Independent Voters of Illinois-Independent Precinct Organization, et al. for leave to file a brief as amici curiae in No. 88-1872 filed.
1	Jun 19 1989	G	Petition for writ of certiorari filed.
2	Jul 26 1989		DISTRIBUTED. September 25, 1989
4	Oct 2 1989		Motion of Independent Voters of Illinois-Independent Precinct Organization, et al. for leave to file a brief as amici curiae in No. 88-1872 GRANTED.
5	Oct 2 1989		Petition GRANTED. The case is consolidated with 88-1872, and a total of one hour is allotted for oral argument.
			**********
6	Oct 16 1989		Record filed.
		*	Certified copy of C. A. Proceedings received. (Vide: 88-1872).
7	Nov 2 1989	G	Motion of petitioners/cross-respondents to dispense with printing the joint appendix filed.
8	Nov 13 1989		Motion of petitioners/cross-respondents to dispense with printing the joint appendix GRANTED.
10	Nov 13 1989		Order extending time to file brief of petitioner on the merits until November 20, 1989.
12	Nov 17 1989		Brief of petitioners Cynthia Rutan, et al. filed. VIDED.
13	Nov 17 1989		Brief amicus curiae of National Education Association filed. VIDED.
14	Nov 20 1989		Brief amicus curiae of AFL-CIO filed. VIDED.
15	Nov 27 1989		SET FOR ARGUMENT TUESDAY, JANUARY 16, 1990. (3RD CASE)
17	Dec 6 1989	G	Motion of North Carolina Professional Fire Fighters Association for leave to file a brief as amicus curiae filed.
16	Dec 8 1989		CIRCULATED.
18	Dec 18 1989	X	Brief of respondents State Officials filed. VIDED.
19	Dec 18 1989	X	Brief amicus curiae of Commonwealth of Puerto Rico filed. VIDED.
20	Dec 30 1989		Adoption of brief on the merits of respondents/cross-petitioners by the Republican State Central Committee ofIllinois and its Chairman Albert Jourdan received and distributed. VIDED
22	Jan 5 1990		Adoption of brief on the merits of respondents/cross-petitioners by Irvin Smith, as representative of all Republican County Charimen in Illinois received and distributed. VIDED.
21	Jan 8 1990		Motion of North Carolina Professional Fire Fighters Association for leave to file a brief as amicus curiae

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No. 88-2074-CFX

Entry	Date	Note	Proceedings and Orders
			GRANTED.
23	Jan 8 1990	X	Reply brief of petitioners Cynthia Rutan, et al. filed.
			VIDED.
24	Jan 16 1990		ARGUED.

88-2074

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK FRECH, *et al.*,

Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the alleged denials of promotion, transfer or rehire have a sufficient effect on the First Amendment rights of public employees to properly state a claim, where the challenged employment decisions are non-punitive and substantially, but not wholly, based on broadly defined "political considerations."

LIST OF PARTIES

The parties to the proceedings in the Seventh Circuit were:

Cross-Petitioners:

MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY and LYNN QUIGLEY, individually and in their official capacities, JAMES R. THOMPSON, individually and as Governor of the State of Illinois; the Republican Party of Illinois, the Republican Party of each county of Illinois, Don W. Adams and Irvin Smith.[1]

Cross-Respondents:

CYNTHIA RUTAN, FRANKLIN TAYLOR, RICKY STANDEFER and DAN O'BRIEN.[2]

[1] Counsel for the Republican Party of Illinois, the Republican Party of each county of Illinois, Don W. Adams and Irvin Smith have indicated that they intend to adopt this Cross-Petition, which is filed on behalf of Cross-Petitioners Frech, Baise, Fleischli, Hawkins, Wright, Reilly, Quigley and Thompson.

[2] James Moore was also a party to the proceedings below but he has no interest in the outcome of this Cross-Petition.

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cross-Petitioners, MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY and JAMES R. THOMPSON, respectfully pray that—solely in the event that a writ of certiorari issues to review one or more of the questions presented in No. 88-1872—a writ of certiorari issue to review one additional aspect of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, on rehearing *en banc*, is reported at 868 F.2d 943 (7th Cir. 1989), and is reprinted in the Appendix to the petition for a writ of certiorari ("the Petition") in No. 88-1872, at A-1. The initial panel opinion of the Court of Appeals for the Seventh Circuit is reported at 848 F.2d 1396 (7th Cir. 1988), and is reprinted in the Appendix to the Petition at B-1. The decision and opinion of the United States District Court for the Central District of Illinois is reported at 641 F. Supp. 249 (C.D. Ill. 1986), and is reprinted in the Appendix to the Petition at C-1.

JURISDICTION

On July 11, 1986, the United States District Court for the Central District of Illinois dismissed plaintiffs' complaint in its entirety with prejudice. 641 F. Supp. at 259; (C-17). On June 8, 1988, the United States Court of Appeals for the Seventh Circuit filed an opinion affirming the district court decision in part, reversing in part, and remanding for further proceedings. 848 F.2d at 1397; (B-1). On February 16, 1989, the Seventh Circuit, on rehearing *en banc*, adopted the panel opinion. 868 F.2d 943; (A-1). Thereafter, on May 17, 1989, plaintiff Moore and Cross-Respondents Rutan and Taylor filed the Petition in No. 88-1872, invoking the jurisdiction of this Court under 28 U.S.C. § 1254(1). Cross-Petitioners received the Petition on May 20, 1989, and now file this Cross-Petition invoking the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Supreme Court Rule 19.5.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, U.S. Const. amends. I and XIV, § 1. These provisions are quoted in full at page 3 of the Petition and, to avoid undue repetition, are incorporated herein by reference.

STATEMENT OF THE CASE

To avoid undue repetition, Cross-Petitioners refer the Court to and incorporate herein pages 2-9 of the State Respondents' Brief in Opposition to the Petition for Writ of Certiorari in No. 88-1872. In addition, Cross-Petitioners add the following facts pertinent to the claims of Cross-Respondents Standefer and O'Brien.

Cross-Respondent Standefer alleges that he was hired in a temporary position in the Spring of 1984 and, along with five other employees, was laid off several months later in November 1984. (R.A. 15, ¶ 21a, b.)[3] Standefer claims that the other five individuals "had the support of the Republican Party" and received new offers for state employment, but that Standefer—who allegedly once had voted in the Democratic primary at some unstated time in the past—did not receive another offer. (R.A. 15, ¶ 21c-e.)

[3] The complaint is reprinted in the Respondents' Appendix ("R.A.") to the State Respondents' Brief In Opposition, at R.A. 1-26.

Cross-Respondent O'Brien alleges that he was laid off from a state job in April 1983, after 12 years of state employment. (R.A. 15-16, ¶ 22a, b.) O'Brien claims that he was not recalled to his previous position, and that several months later he received another state job with less seniority and salary after obtaining the support of the Chairman of the Republican Party of Logan County. (R.A. 16, ¶ 22d, e, g.)

Neither Standefer nor O'Brien allege that their separations were in any manner related to political considerations. Nor do they allege that they were more qualified than other individuals who were offered other state employment or recalled from layoff, or that those other individuals were unqualified under the Illinois Personnel Code. *Ill. Rev. Stat.* ch. 127, ¶ 63b101, *et seq.* (1985).

The district court dismissed the claims of Standefer and O'Brien. *Rutan*, 641 F. Supp. at 253; (C-5). As with the hiring, promotion and transfer claims of the other plaintiffs, the district court found that the claims of Standefer and O'Brien did not "support a scenario of punitive actions based solely upon political belief." 641 F. Supp. at 255-56; (C-11).

The Seventh Circuit reversed the district court's dismissal of the claims of Standefer and O'Brien, and remanded for further proceedings. *Rutan*, 868 F.2d at 954; (A-23-24). The Seventh Circuit held that the failure to recall or rehire does not in and of itself violate the rule enunciated in *Elrod v. Burns*, 427 U.S. 347 (1976), as many laid-off employees "will stand essentially in the position of new job applicants when they seek a position." 868 F.2d at 956; (A-27). Nonetheless, the Seventh Circuit remanded the claims for a determination whether the alleged failure to offer Standefer another position or to

recall O'Brien to his former job were the "substantial equivalent of dismissal" and thus actionable under the First Amendment. 868 F.2d at 956-57; (A-27-29).

REASONS FOR GRANTING THE WRIT ON THE CROSS-PETITION IF THE WRIT IS GRANTED ON THE PETITION

In the State Respondents' Brief In Opposition ("State Resp. Br."), we demonstrate that review of the Seventh Circuit's decision in this case is unwarranted. The Seventh Circuit's decision is not in conflict either with decisions of this Court or with decisions of other Courts of Appeal. (State Resp. Br. at 11-25.) In addition, the interlocutory posture of the non-hiring claims creates the possibility that the promotion and transfer claims of Petitioners Rutan and Taylor could be rendered moot by further proceedings in the district court, another consideration that strongly counsels against granting the writ. (State Resp. Br. at 25 n.16.)

However, if this Court grants review, we ask the Court to review a question which is encompassed by the broadly framed questions set forth in the Petition, but on which Cross-Petitioners would seek a ruling different from that issued by the Seventh Circuit: whether Cross-Respondents' allegations of non-punitive denials of promotion, transfer and rehire, based in part on broadly defined "political considerations," are sufficient to state a cause of action under the First Amendment and 42 U.S.C. § 1983. As with non-punitive denials of employment, the use of such "political considerations" in these other employment

decisions does not state a constitutional claim. Accordingly, if the Court grants review, Cross-Petitioners ask that the Court reinstate the district court decision dismissing the promotion, transfer and rehire claims of Cross-Respondents Rutan, Taylor, Standefer and O'Brien.

In Part I, we show that the *Elrod* analysis does not prohibit the non-punitive use of political considerations in contexts other than dismissals. In Part II, we show that prudential considerations militate strongly against converting every employment decision into a constitutional issue, and thus injecting the judiciary further into the political process.

I.

THE NON-PUNITIVE USE OF POLITICAL CONSIDERATIONS IN EMPLOYMENT DECISIONS OTHER THAN DISMISSAL DOES NOT STATE A CONSTITUTIONAL CLAIM.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court recognized that patronage practice runs afoul of the First Amendment only "to the extent it compels or restrains belief and association." *Id.* at 357. In *Elrod*, the Court found that a dismissal or threat of dismissal from existing employment based solely on partisan reasons "unquestionably inhibits protected belief and association" and "penalizes its exercise," and thus raises a constitutional issue. *Id.* at 359.

The allegations of Cross-Respondents in this case are vastly different from the claims presented in *Elrod*. Unlike *Elrod*, there is no allegation that Cross-Respondents were punished for their political beliefs; rather, it is alleged only that they "did not receive some favorable employment decisions" as an incidental effect of the non-

punitive use of political considerations. *Rutan*, 868 F.2d at 947, 954 n.4; (A-8, 23 n.4); 641 F. Supp. at 255-56, 57; (C-11, 13). Unlike *Elrod*, there is no allegation of a strict political test as the sole basis for employment decisions; Cross-Respondents allege only that a "substantial" factor in such decisions are broadly defined "political considerations" which include the use of recommendations from friends or relatives of Republicans. (R.A. 7, ¶ 11f.) Unlike *Elrod*, there is no allegation in this case that any state employee was discharged, or threatened with discharge, with the concomitant disruption of settled expectations. The district court correctly recognized that these distinctions were critical under the *Elrod* analysis, and required the dismissal of all of Cross-Respondents' claims. 641 F. Supp. at 255-56; (C-11).

Likewise, the Seventh Circuit properly discerned that these distinctions required dismissal of Petitioner Moore's hiring claim. The Seventh Circuit reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." 868 F.2d at 954; (A-24). Moreover, as had the court in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the Seventh Circuit observed that any incidental effect that might flow from the use of political considerations as a basis for non-punitive employment decisions "must be distinguished" from acts of direct retaliation for protected speech. 868 F.2d at 954 n.4; (A-23 n.4). Accordingly, the Seventh Circuit affirmed the dismissal of Petitioner Moore's hiring claim.

Although it recognized that any effect of the alleged use of political considerations in promotion, transfer and rehire decisions was equally incidental, the Seventh Circuit declined to affirm the dismissal of those claims. Rather, the court remanded those claims on the rationale that the

claims could raise a constitutional issue were it demonstrated that the effect of the denial of promotion, transfer and rehire was to "impose the same burden as outright termination." 868 F.2d at 952; (A-17).

A remand for this determination is unnecessary. This Court has recognized that the loss of an existing job solely for partisan reasons "unquestionably" inhibits First Amendment rights. *Elrod*, 427 U.S. at 359. It is equally unquestionable that the mere failure to obtain a desired promotion or transfer is not the equivalent of discharge. Cross-Respondents Rutan and Taylor do not claim that their failure to obtain desired promotions or transfers either resulted in the loss of or in any way adversely affected the terms of their existing employment.

This mere failure to obtain a promotion or transfer thus does not have the same profound effect on First Amendment rights as does a discharge. *Cf. Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1256 n.4 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (mere failure to promote is insufficient to result in constructive discharge); *Sparrow v. Piedmont Health Systems Agency, Inc.*, 593 F. Supp. 1107, 1117 (M.D.N.C. 1984) (failure to promote does not provide the basis for constructive discharge). This is particularly evident where, as here, (1) political considerations are not alleged to be the sole basis for the employment decision, and (2) the alleged political considerations do not constitute a strict partisan litmus test, but embrace a variety of factors, including friendship. (R.A. 7, ¶ 11f.) Accordingly, the Seventh Circuit should have affirmed the dismissal of the promotion and transfer claims of Cross-Respondents Rutan and Taylor.

A remand also is unnecessary to determine that the rehiring claims of Cross-Respondents Standefer and O'Brien

fail to state a constitutional claim. As the Seventh Circuit recognized, these claims are even "more straightforward" than the promotion and transfer claims. 868 F.2d at 956; (A-27). Cross-Respondents Standefer and O'Brien do not allege that their separations were in any way motivated by political considerations. Nor do they claim that they had a constitutional right to recall or rehire.

Based on their own allegations, Standefer and O'Brien stood in the position of new applicants for employment, with no pre-existing right to obtain a job. As with the hiring claim of Petitioner Moore, any conceivable burden on the First Amendment interests of Standefer and O'Brien as a result of their failure to obtain rehire or recall "is much less significant than losing a job." 868 F.2d at 952; (A-18). As with the hiring claim of Petitioner Moore, the rehire and recall claims of Standefer and O'Brien fail to state a constitutional claim. Accordingly, the Seventh Circuit should have affirmed the dismissal of those claims.

II.

THE SEVENTH CIRCUIT'S DECISION ON THE PROMOTION, TRANSFER AND REHIRE CLAIMS UNNECESSARILY WOULD INJECT THE COURTS INTO THE POLITICAL PROCESS.

The Seventh Circuit recognized that acceptance of the plaintiffs' arguments would enlist the courts in a campaign to completely purge political considerations from all aspects of the employment process. "[P]laintiffs essentially ask that we constitutionalize civil service and then preside over the system." 868 F.2d at 954; (A-22).

The court also observed, correctly, that such an effort not only would be an "unprecedented intrusion into the political affairs of the states and other branches of federal

government," *id.*, but also would be of doubtful practicality and wisdom (868 F.2d at 954; A-23):

> Banning political considerations from all public service employment decisions, even if practical, would diminish the will of the voters, insert courts into disputes between political factions, and stifle the ability of elected officials to govern. These public policy questions, rife with serious concerns over federalism and—in the case of federal employment—separation of powers, are best left in the political arena.[4]

In remanding the promotion, transfer and rehire claims, the Seventh Circuit failed to give full effect to these problems. The Seventh Circuit agreed that the use of broadly defined political considerations in making promotion, transfer and rehire decisions is not constitutionally forbidden. At the same time, the "substantial equivalent of dismissal" test guarantees that the use of political considerations will embroil government officials in litigation with those disappointed by a promotion, transfer or rehire decision. Because dismissal of such claims may be difficult, public officials will be put to the burden of discovery before they may obtain summary judgment.

And the burden would be substantial. There are some 60,000 persons employed statewide in Illinois who would

[4] The Seventh Circuit has not been alone in this observation. *See Avery v. Jennings*, *supra*, 786 F.2d at 237; *see also Messer v. Curci*, 610 F. Supp. 179, 183 (E.D. Ky. 1985), *appeal pending en banc*, No. 85-5626 (6th Cir.) ("applying the *Elrod* decision to *hiring* would be likely to involve local government officials in numerous lengthy trials concerning the merits of disappointed job seekers"); *Horn v. Kean*, 593 F. Supp. 1298, 1301 (D.N.J. 1984), *aff'd*, 796 F.2d 668 (3d Cir. 1986) (en banc) (absent punitive measures, the principles of *Elrod* "have been applied quite narrowly and have not been employed to curb other patronage personnel actions such as hirings, transfers, reassignments, demotions, and failures to promote").

be implicated by the Seventh Circuit's decision. Unlike termination decisions, which are more limited in number, tens of thousands of decisions are made annually concerning promotion, transfer and rehire. There are at least that many individuals who might be disappointed because they did not receive a desired promotion, transfer or rehire.

Moreover, any benefit to be achieved by imposing this burden would be wholly illusory. Unlike the discharge at issue in *Elrod*, non-punitive employment decisions involving promotion, transfer or rehire do not carry the potential for chilling First Amendment rights. Indeed, even while remanding Cross-Respondents' promotion, transfer and rehire claims, the Seventh Circuit expressed substantial doubt that that such non-punitive employment decisions could be the "substantial equivalent of dismissal." *E.g.*, 868 F.2d at 955; (A-25).

This Court has cautioned that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood*, 426 U.S. 341, 349 (1976). This admonition is particular apt in this case. Under the Seventh Circuit's disposition of the promotion, transfer and rehire claims, the potential for uncontrollable litigation by those allegedly bypassed due to "political considerations" is enormous. Moreover, imposing this burden is not necessary to protect First Amendment rights, especially in the context of promotion, transfer and rehire decisions which are neither punitive nor based solely on political considerations, and which utilize broadly defined "political considerations" that are not strictly partisan.

The promotion, transfer and rehire claims raise "profound questions of political science that exceed judicial competence to answer." *LaFalce v. Houston*, 712 F.2d

292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). The Seventh Circuit's remand unnecessarily injects the courts into this political debate.

CONCLUSION

For the foregoing reasons, if this Court grants review of any question presented in No. 88-1872, the Cross-Petition also should be granted.

Respectfully submitted,

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Nos. 88-1872, 88-2074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, *ET AL.*

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IN THE

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REPUBLICAN PARTY OF ILLINOIS, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, ET AL.

The National Education Association (NEA) moves for leave to file the attached brief *amicus curiae* in support of petitioners Cynthia Rutan, *et al.* Consent to the filing of said brief has been obtained from all parties except the Republican Party of Illinois, which has refused to consent.

NEA is the largest public employee organization in the United States, with approximately two million members, virtually all of whom are employed by public educational institutions. Because NEA members in certain

jurisdictions are subject to patronage practices such as those at issue here, NEA has a vital interest in the disposition of this case. Moreover, the Court's decision may have an impact on the exercise of First Amendment rights by NEA members in other contexts.

In the attached brief *amicus curiae*, NEA seeks to demonstrate that the court below erred in holding that patronage employment practices that are not the "substantial equivalent to a dismissal" are permitted by the First Amendment. To support this conclusion the brief establishes three propositions: first, that an employment action need not amount to dismissal in order to give rise to a cognizable First Amendment claim; second, that the interest of the State as an employer is no stronger in the case of patronage hiring, rehiring after layoff, promotion, or transfer than in the case of patronage dismissal, and cannot justify the challenged employment actions; third, that the interest of the State in the preservation of the democratic process is not served by patronage employment practices, and even if it were, the use of such practices with regard to persons already employed by the government goes far beyond what possibly could be necessary to serve that asserted State interest.

For the foregoing reasons, this motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, ET AL.

The National Education Association submits this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is stated in that motion.

SUMMARY OF ARGUMENT

Petitioners Cynthia Rutan, *et al.* ("plaintiffs") alleged that they were deprived of certain employment benefits because of "political considerations," including whether they were members of the Republican Party, were sponsored by influential Republicans, and were contributors to the Republican Party. The court below acknowledged that if this case had involved *dismissals* from employment, plaintiffs' allegations would, under this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), state a claim for relief. The Court of Appeals ruled, however, that the

principles established in *Elrod* and *Branti* should be confined to patronage dismissals and to other patronage employment practices that are the "substantial equivalent to a dismissal." 868 F.2d at 949-54. That ruling is erroneous.

The line drawn by the Court of Appeals cannot be defended, as defendants urged below, on the ground that employment sanctions directed at protected association or beliefs do not rise to a level of constitutional magnitude unless dismissal or its "substantial equivalent" is involved. This Court has made it abundantly clear that First Amendment rights are implicated whenever the State denies an employment benefit to a person because of his or her constitutionally protected association or beliefs. Part I, *infra* at pp. 7-14.

Accordingly, the only basis on which the ruling of the court below could be defended would be that there is a specific governmental interest sufficient to justify the limitations that the challenged patronage practices place on the First Amendment rights at stake. For purposes of analysis, the governmental interests arguably involved in this case must be divided into two distinct categories: (A) the State's interest as an employer in providing for "the effective performance of the public office involved," *Branti*, 445 U.S. at 518, and (B) the State's interest in "the preservation of the democratic process," *Elrod*, 427 U.S. at 368 (plurality opinion).

With respect to the interest of the State as an employer, *Branti* held that "the question is whether the [State] can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," 445 U.S. at 518. That formulation is fully consistent with the Court's more developed analysis in *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*, 483 U.S. 378 (1987). The latter cases establish that where an employment action is based on an employee's speech, association or beliefs respecting a matter of "public concern," it is entirely appropriate for a

federal court to scrutinize that action by balancing "the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, against "[the employee's] interest in making her statement [or in holding to her association or beliefs]," *Rankin*, 483 U.S. at 388. In striking that balance, the relative severity of the employment sanction that has been imposed—be it suspension, termination, denial of promotion, or some other action—is not a factor to be weighed: the interest to be evaluated is the employee's interest in freedom of speech, association and belief, not his or her interest in employment as such. It follows that unless the State can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved," the interest of the State as an employer would not justify patronage hiring, rehiring after layoff, promotion or transfer any more than that interest would justify patronage dismissal. Part II A, *infra* at pp. 15-21.

It also has been argued—particularly by Justice Powell in dissent in both *Elrod* and *Branti*—that because patronage allegedly contributes to the development of stable political parties, it is essential to the State's interest in the preservation of the democratic process. In *Elrod* and *Branti* the Court found this rationale insufficient to justify patronage dismissals. As the plurality opinion in *Elrod* persuasively demonstrates, patronage is, at bottom, a practice that profoundly disserves the democratic system; therefore it is insufficient as a justification for *any* employment actions. But even if it were accepted that *some* degree of patronage is essential to the preservation of the democratic process, the fact that patronage restricts freedom of belief and association dictates that this governmental interest be pursued through the means least restrictive of those freedoms. *Elrod*, 427 U.S. at 362-63 (plurality opinion). *See also, e.g., Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1168 (1988). If the State's interest in fostering the democratic process requires the toleration of

any patronage practices—and we contend that it does not —that interest surely does not require the use of patronage with regard to employees *after they have been hired.* Moreover, the use of patronage to govern decisions affecting persons already in the government's employ is even more "intrusive" of employee interests than is patronage hiring, *cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1985) (plurality opinion), and such use also puts improper pressure on public employees to "practic[e] political justice" in performing their duties, *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973). It follows that if the State's interest in the preservation of the democratic process justifies any use of patronage, such use should be limited strictly to hiring, and should not extend to rehiring after layoff, promotion, transfer, dismissal, or other post-hiring employment decisions. Part II B, *infra* at pp. 21-29.

ARGUMENT

INTRDUCTION

Because this case was decided on a motion to dismiss for failure to state a claim, it must be taken as true that the employment actions at issue were "substantially motivated by political considerations," including, *inter alia*, whether plaintiffs were members of the Republican Party, were sponsored by influential Republicans, and were contributors to the Republican Party, Complaint ¶ 11f. It also must be taken as true that the denials of employment benefits to plaintiffs were "a direct and proximate result" of the aforesaid patronage practices. *Id.* ¶¶ 31-34. *See also id.* ¶ 11k ("The purpose and effect of the political patronage system operated under the 'Governor's Office of Personnel' is to limit State employment and the benefits of State employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits.").

If this case had involved *dismissals* from employment, the allegations would, under this Court's decisions in

Elrod v. Burns, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), state a claim for relief, unless it were shown that the jobs in question were ones as to which "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.[1] Neither defendants nor the court below assert that *Elrod* or *Branti* were wrongly decided, and they do not suggest that the jobs involved here—which include equipment operator, garage employee, and "Dietary Manager" at a particular facility —are such as to invoke the exception for the "effective performance of the public office involved."[2] Rather, defendants and the court below maintain that the principles established in *Elrod* and *Branti* are not controlling in

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[1] Defendants have argued that plaintiffs failed to state a claim because they did not allege that defendants relied *solely* on political considerations in making the challenged employment decisions. *See also Avery v. Jennings*, 786 F.2d 233, 236 (6th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986). Such an allegation is not required. It is hardly conceivable that any employment decision would be based *solely* on a constitutionally prohibited criterion; the decisionmaker will almost always consider, at least to some minimal extent, other factors, such as whether a candidate possesses the stated qualifications for a position. Constitutional protections would virtually evaporate if, as defendants suggest, they were available only where the government acts with utter single-mindedness. The cases adopt no such approach. Rather, if a plaintiff alleges and ultimately proves that protected speech, association or belief was a " 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' "—in an employment action, the burden shifts to the defendant to "show[] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Thus plaintiffs' allegations of causation are sufficient to state a claim of a constitutional deprivation. *See Branti*, 445 U.S. at 512 n.6. The Sixth Circuit's contrary suggestion in *Avery, supra*, is flatly inconsistent with both *Branti and Mt. Healthy.*

[2] We do not understand defendants to take the position that these jobs fall into that category. In all events, at this juncture (motion to dismiss for failure to state a claim) such a proposition certainly has not been established.

this case because the burden imposed by the challenged patronage practices "is much less significant than losing a job," 868 F.2d at 952. They contend that these principles should be confined to dismissals and to employment actions that are the "substantial equivalent to a dismissal." 868 F.2d at 949-54.[3]

The Court of Appeals offered no reasoned support for the construct it adopted,[4] but it is axiomatic that if the

[3] The Court of Appeals' concept of the "substantial equivalent to a dismissal" makes no sense on its own terms, as Judge Cudahy noted in dissent. *See* 868 F.2d at 959 (Cudahy, J., dissenting). The Court of Appeals stated that in determining whether an employment action is the "substantial equivalent to a dismissal," the courts should apply the familiar definition of a "constructive discharge"—*viz.*, employer conduct that would cause a reasonable person to quit his employment. *See* 868 F.2d at 950. Yet the court also stated that such claims can be brought by persons who did *not* quit. *See id.* at 955-56. This approach is totally illogical: to ask whether a person who is still employed was constructively discharged is a contradiction in terms; and if the test is whether a reasonable person would have quit, then by definition, if the employee did *not* quit, only an "unreasonable" plaintiff can prevail.

[4] The Court of Appeals declared that its decision to limit *Elrod* and *Branti* to discharges (actual or constructive) flowed from two considerations: (i) "the fact that real differences exist between dismissals and other patronage practices" because "absent unusual circumstances, employment decisions not involving dismissals, such as failing to transfer or promote an employee, are significantly less coercive and disruptive than discharges," *id.* at 952, and (ii) "the substantial intrusion of the federal courts into the political affairs of the States and other branches of the federal government that would necessarily flow from extending *Branti* and *Elrod* beyond constructive discharges," *id.* As we show in the body of our argument, these considerations fail to support the court's position.

The court below added a third factor to the mix by declaring that actions "falling short of actual or constructive discharge" are actionable if they constitute *"retaliatory harassment,"* but that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off," *id.* at 954 n.4 (emphasis added). This proffered distinction between favoring supporters and retaliating against opponents leads to nonsensical results: an employee denied a promotion because he was not a Republican would have no claim, but "even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable" if it were based on political affiliation, *id. See also Pieczynski v. Duffy*, 875 F.2d 1331, 1333, 1336 (7th Cir. 1989) (public employee may be denied hire, promotion or transfer due to his political beliefs or affiliations, but "a campaign of petty harassments directed against a public employee in retaliation for his political beliefs or affiliations violates the First Amendment"). And, the Seventh Circuit's construct does violence to the most basic principles of First Amendment law. No one would suggest, for example, that although a public employer could not refuse to promote Jewish employees because the employer disliked Jews, it would be constitutional for the employer to adopt a policy favoring Christian candidates because the employer liked Christians. So too in the context of patronage practices, the distinction proposed by the Court of Appeals, to the extent that it has any operational content, "would surely emasculate the principles set forth in *Elrod*. While it would perhaps eliminate the mo[st] blatant forms of coercion . . ., it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party . . . ." *Branti*, 445 U.S. at 516.

line drawn by that court is to be defended, the defense must either be that patronage practices short of dismissal implicate no First Amendment rights, or that some specific governmental interest justifies the encroachment on First Amendment rights that does result from the patronage practices at issue. We consider—and refute—each of these possible defenses in turn below.

I. EMPLOYMENT ACTIONS BASED ON PATRONAGE NEED NOT AMOUNT TO DISMISSAL IN ORDER TO GIVE RISE TO A COGNIZABLE FIRST AMENDMENT CLAIM

The line drawn by the Court of Appeals plainly cannot be defended, as defendants urged below, on the ground that employment sanctions directed at protected speech, association or belief do not rise to a level of constitutional magnitude unless dismissal or its "substantial equivalent" is involved. This Court has made it abundantly clear that " '[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interfer-

ence.'" *Healy v. James*, 408 U.S. 169, 183 (1972) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 264 (1957) (Frankfurter, J., concurring) ("'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'" (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

Thus, the Court consistently has rejected the suggestion that only the most onerous sanctions or burdens imposed on speech and association trigger First Amendment scrutiny. For example, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), which involved a limit on contributions to committees formed to support or oppose ballot measures, the Court stated that "[t]o place a Spartan limit—*or indeed any limit*—on individuals wishing to band together to advance their views on a ballot measure . . . is clearly a restraint on the right of association." *Id.* at 296 (emphasis added). And, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court had this to say with respect to agency fees that public employees were required to pay to a union:

> The amount at stake for each individual dissenter does not diminish [the risk that the dissenter's funds will be used to finance ideological activities unrelated to collective bargaining]. For, *whatever the amount*, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)], we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for "the propagation of opinions which he disbelieves."

Id. at 305 (emphasis added; footnote omitted). *See also Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 46 (1868) (tax of one dollar for passing through state of Nevada just as unconstitutional as tax of $1,000).[5]

[5] Applying this properly unyielding principle, the Court has recognized constitutional violations in numerous government actions involving relatively small burdens on First Amendment rights. In the freedom of association area alone, the Court has found that, *inter alia*, the following penalties rise to a level that triggers constitutional solicitude: denying college recognition to a campus organization, *Healy v. James*, *supra*; forbidding all individual campaign expenditures over $1000 per candidate, *Buckely v. Valeo*, 424 U.S. 1, 22-23, 39-51 (1976) (per curiam); forbidding contributions over $250 to committees supporting or opposing ballot proposals, *Citizens Against Rent Control v. City of Berkeley*, *supra*; requiring party disclosure of all campaign contributors, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); withholding mailings, *Lamont v. Postmaster General*, 381 U.S. 301 (1965); revoking passports, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); and compelling disclosure of party membership lists, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). And, in other cases involving freedom of speech and belief, state sanctions that have been found to violate First Amendment rights have included the following: taxing certain types of publications, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); suspending a student from school, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); withholding public television grants, *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); denying a property tax exemption, *Speiser v. Randall*, 357 U.S. 513 (1958); denying a tax exemption for any paper and ink used by a newspaper beyond a specified amount, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); excluding persons from taking a bar examination, *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); and denying unemployment benefits to persons who have exercised religious beliefs, *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Indiana Empolyment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

It also should be noted that the Court has held that damages under 42 U.S.C. § 1983 for violation of First Amendment rights may include compensation for injuries such as impairment of reputation, personal humiliation, mental anguish and suffering, and mental and emotional distress. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *see also Carey v. Piphus*, 435 U.S. 247, 263-64 (1978).

In public employment, as in other contexts, the Court's decisions establish that the First Amendment's field of protection does not lie fallow until the government imposes the most severe sanction available to it (*i.e.*, dismissal). Rather, the guiding principle is that the government cannot "deny a benefit to a person because of his constitutionally protected speech or associations," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). And because this principle is to be "applied . . . regardless of the public employee's contractual or other claim to a job," *id.*, the Court repeatedly has ruled that the State may not impose unconstitutional conditions on employment, even in cases where the employee had no settled expectations of continued service in the job in question. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Perry, supra*; and *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), all involving the nonrenewal of *non*tenured teachers' one-year contracts. *See also Torcaso v. Watkins*, 367 U.S. 488 (1961) (First Amendment violation found where a person had been appointed to the office of Notary Public but had not yet received his commission to serve because of his refusal to declare his belief in God).[6]

[6] In the numerous cases involving actual or threatened dismissals that have been decided by this Court, it never has been suggested that constitutional protection would not have been triggered by a refusal to hire, or by some other lesser sanction. *See, e.g., United States v. Robel*, 389 U.S. 258, 266 (1967) (statute sought "to bar employment . . . for association which may not be proscribed consistently with First Amendment rights"); *Keyishian, supra*, 385 U.S. at 605-06 ("the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected"); *Shelton, supra* (unconstitutional statute applied to teachers rehired on a year-to-year basis); *Weiman v. Updegraff*, 344 U.S. 183, 192 (1952) ("constitutional protection does extend to the public servant whose *exclusion* pursuant to a statute is patently arbitrary or discriminatory") (emphasis added). There is nothing in any of these cases to indicate that constitutional protection was available only because employees had developed some settled expectations of continued employment.

In keeping with these principles, the courts of appeals uniformly have recognized that First Amendment claims may arise from employment actions short of dismissal, including such actions as denial of promotion;[7] transfer of jobs (even without loss of pay);[8] reassignment, decrease in responsibility or change of duties;[9] demotion, salary decrease and/or loss of benefits;[10] removal from extra-

[7] *Clark v. Library of Congress*, 750 F.2d 89, 99-102 (D.C. Cir. 1984); *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984); *MacFarlane v. Grasso*, 696 F.2d 217 (2d Cir. 1982); *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. Unit A 1980); *Orr v. Thorpe*, 427 F.2d 1129 (5th Cir. 1970).

[8] *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987); *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985), *cert. denied*, 474 U.S. 803 (1985); *Robb v. City of Philadelphia, supra*; *Bowman v. Pulaski Cnty. Special School Dist.*, 723 F.2d 640 (8th Cir. 1983); *Hughes v. Whitmer*, 714 F.2d 1407, 1421 (8th Cir. 1983) (relief denied for failure to prove that transfer was triggered by First Amendment activity), *cert. denied*, 465 U.S. 1023 (1984); *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982), *cert. denied*, 464 U.S. 918 (1983); *Smith v. West Memphis School Dist.*, 635 F.2d 708, 710 (8th Cir. 1980) (relief denied for failure to prove that transfer was triggered by First Amendment activity); *McGill v. Board of Educ. of Pekin Elementary School Dist. No. 108 of Tazewell Cnty.*, 602 F.2d 774 (7th Cir. 1979); *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978); *cert. denied*, 464 U.S. 918 (1983); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977); *Bernasconi v. Tempe Elementary School Dist. No. 3*, 548 F.2d 857 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1977); *Acanfora v. Board of Educ. of Montgomery Cnty.*, 491 F.2d 498, 500-01 (4th Cir. 1974) (plaintiff estopped from seeking relief because of omission of information in employment application), *cert. denied*, 419 U.S. 836 (1974).

[9] *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989); *Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096 (5th Cir. 1987); *Allen v. Scribner, supra*; *Bowman v. Pulaski Cnty. Special School Dist., supra*; *Reichert v. Draud*, 701 F.2d 1168 (6th Cir. 1983) (relief denied where protected conduct did not play substantial part in decision to change teaching schedule); *Childers v. Indep. School Dist. No. 1 of Bryan Cnty.*, 676 F.2d 1338 (10th Cir. 1982); *Lemons v. Morgan*, 629 F.2d 1389 (8th Cir. 1980); *Acanfora v. Bd. of Educ. of Montgomery Cnty., supra*.

[10] *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982); *Childers v. Indep. School Dist. No. 1 of Bryan Cnty., supra*.

curricular positions at schools;[11] denial of a salary increase;[12] suspension;[13] refusal to recommend for a promotion;[14] filing letters of reprimand or negative or lowered evaluations;[15] providing negative evaluations to prospective employers;[16] denial of a personal leave day;[17] rescission of permission for leave to attend union meetings;[18] removing certain perquisites of office;[19] and harassment.[20] In many of these cases, the courts explicitly have rejected the argument that because the sanction imposed was less injurious than dismissal there could be no cause of action, or have expressly stated that such lesser sanctions must be treated no differently than dismissals.[21]

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[11] *Knapp v. Whitaker, supra* (removal from position as assistant baseball coach); *Lemons v. Morgan, supra* (removal from position as school radio station manager).

[12] *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 928 (1982).

[13] *Anderson v. Central Point School Dist. No. 6*, 746 F.2d 505 (9th Cir. 1984); *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983).

[14] *Hatcher v. Board of Pub. Educ. and Orphanage for Bibb Cnty.*, 809 F.2d 1546, 1555-59 (11th Cir. 1987).

[15] *Knapp v. Whitaker, supra*; *Swilley v. Alexander*, 629 F.2d 1018 (5th Cir. 1980); *Columbus Educ. Ass'n v. Columbus City School Dist.*, 623 F.2d 1155 (6th Cir. 1980); *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980); *Simpson v. Weeks, supra*; *Bence v. Breier*, 501 F.2d 1185 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970).

[16] *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986) (*per curiam*).

[17] *Knapp v. Whitaker, supra.*

[18] *Orr v. Thorpe, supra.*

[19] *Reeves v. Claiborne Cnty. Bd. of Educ., supra.*

[20] *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989); *Allen v. Scribner, supra*; *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).

[21] *See, e.g., Thomas*, 881 F.2d at 829-30; *Allen*, 812 F.2d at 434 nn. 16 & 17; *Anderson*, 746 F.2d at 507-08; *Bowman*, 723 F.2d at 645; *Hughes*, 714 F.2d at 1421; *Reichert*, 701 F.2d at 1172-74 (Krupansky, J., concurring); *Waters*, 684 F.2d at 837 n.9; *Childers*, 676 F.2d at 1341-42; *Egger*, 669 F.2d at 501-02; *Allaire*, 658 F.2d at 1058 n.2; *Bickel*, 632 F.2d at 1255 n.6; *Yoggerst*, 623 F.2d at 39; *McGill*, 602 F.2d at 779-80; *Bernasconi*, 548 F.2d at 860. *See also Robb*, 733 F.2d at 295 (whereas denial of promotion does not cause property loss for purposes of due process analysis, it could constitute First Amendment deprivation).

Although the holding in *Elrod* dealt only with the constitutional validity of patronage dismissals, the plurality decision recognized that First Amendment interests are implicated by *any* governmental action that restricts an individual's employment opportunities on the basis of his or her beliefs or associations. As the plurality put it, "[r]*egardless of the nature of the inducement*, whether it be by the denial of public employment or . . . by the influence of a teacher over students, '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Elrod*, 427 U.S. at 356 (plurality opinion) (emphasis added) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). *See also Branti*, 445 U.S. at 513-14. With specific reference to employment, the *Elrod* plurality went on to note that "[t]his Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11 (plurality opinion). *See also id.* at 359-60 n.13 ("[T]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.").[22]

The upshot of these principles is that "official pressure upon employees to work for political candidates not of the

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[22] Denial of a benefit based on discriminatory treatment of protected speech, association or belief, such as preferring association with one political party rather than association with another, abridges not only First Amendment rights, but Equal Protection guarantees as well. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 n.3 (1987).

worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Connick v. Myers*, 461 U.S. 138, 149 (1983). Because this statement holds true whether the instrument of such pressure is a dismissal or some lesser employment sanction,[23] the Court of Appeals' decision cannot be defended on the ground that the employment actions at issue here offend no First Amendment rights. If the rule announced by the court below is to be defended, it must be because some specific governmental interest is sufficient to justify the limitation that the challenged patronage practices impose on the First Amendment rights at stake. As we demonstrate below, that defense also fails.

II. THE INFRINGEMENT OF FIRST AMENDMENT RIGHTS AT ISSUE HERE IS NOT JUSTIFIED BY ANY SUFFICIENT GOVERNMENTAL INTEREST

Two governmental interests are offered in support of patronage employment practices. First, patronage is said to serve the State's interest as an employer in the "effective performance of the public office involved." *Branti*, 445 U.S. at 518. *See generally Elrod*, 427 U.S. at 364-

[23] There could in theory be some employment actions taken against employees that would have no potential to induce *any* forsaking of the exercise of First Amendment rights. For example, the fact that a Republican employer might occasionally frown at a Democratic employee presumably would not be enough of a "sanction" to deter even the most minuscule amount of First Amendment activity. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). A constitutional tort, like any other tort, requires *some* injury in order to be actionable.

But the Court need not for present purposes consider whether there could be any "*de minimus*" threshold beneath which no constitutional tort would be actionable, because this clearly is not such a case. The Seventh Circuit acknowledged that the employment actions at issue here "will unquestionably have some negative effects on those people who did not support or are not connected with the party or faction in power." 868 F.2d at 952. In fact, the *de minimus* hypothetical may be dismissed as a strawman: cases for injuries of the non-deterring sort described above simply are not brought by plaintiffs in the federal courts, and could readily be disposed of if they were. *See infra* note 28.

68.[24] Second, it is suggested that patronage serves the State's interest in "the preservation of the democratic process," *Elrod*, 427 U.S. at 368; this was the theory of Justice Powell's dissents in *Elrod*, *id.* at 382-87, and *Branti*, 445 U.S. at 527-32. As the following discussion makes clear, these two asserted governmental interests are analytically distinct; it therefore is necessary to consider them separately.

A. Where Political Affiliation is Not "An Appropriate Requirement For the Effective Performance of the Public Office Involved," the Interest of the State as an Employer is No More Served by the Patronage Practices at Issue Here than by the Patronage Dismissals Proscribed in *Elrod* and *Branti*

This Court held in *Branti* that the constitutionality of patronage dismissals turns on whether the State "can

[24] The plurality opinion in *Elrod* identified as separate governmental interests "the need to insure effective government and the efficiency of public employees," 427 U.S. at 364, and "the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. These two interests, which implicate the State's interests as an employer in providing services to the public, essentially were consolidated into one interest in *Branti*, when the Court stated that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. *See also id.* at 517 & n.12. The *Branti* Court's recognition that these two interests are facets of what is in reality a single State interest is sound. Just as the effective performance of a job in the private sector requires not only efficiency but also fidelity to the directives of the company's managers, the effective performance of a public sector job requires fidelity to the policy directives of higher officials. The fact that those officials presumably speak for the electorate rather than for private shareholders may give the matter an added dimension, but it does not change the nature of the inquiry: either an employee's party affiliation is "an appropriate requirement for the effective performance of the public office involved"—whether in contributing to efficiency or in contributing to fidelity to policy—or it is not.

demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," 445 U.S. at 518. Because the only practice at issue in *Branti*, as in *Elrod*, was patronage dismissal, the Court had no occasion to address the constitutionality of other kinds of patronage practices. But nothing in the Court's analysis suggests that the State's interest as an employer could justify using patronage to determine who will hold a position through hiring, rehiring after layoff, promotion, or transfer, when that interest would not justify using patronage as a basis for discharging a person from that same position. To the contrary, the *Branti* Court stated that where, as with the assistant public defender positions at issue in that case, the State cannot demonstrate "that party affiliation is an appropriate requirement for the effective performance of the public office involved," "it is difficult to formulate any justification for tying *either the selection or retention* of [the employee] to his party affiliation," *id.* at 520 n.14 (emphasis added). As Justice Powell observed in his dissenting opinion, "[i]f this latter statement is not a holding of the Court, it at least suggests that the Court perceives no constitutional distinction between selection and dismissal of public employees," *id.* at 522.

The teaching that we derive from *Elrod* and *Branti* (*i.e.*, that if the State's interest as an employer does not justify patronage dismissals with respect to a particular job because party affiliation is not "an appropriate requirement for the effective performance of the public office involved," that interest likewise does not justify using patronage as the basis for other employment actions with respect to that job), is confirmed by subsequent cases involving other First Amendment claims arising in the context of public employment. The basic mode of analysis that applies in balancing the interest of the State as an employer against the interest of employees in freedom of speech, belief, and association, was fully developed by the Court in the post-*Branti* cases of *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*,

483 U.S. 378 (1987). Those decisions establish two principles that are crucial to the proper resolution of this case.

First, because the Court in *Connick* recognized the importance of avoiding unduly intrusive involvement by the judiciary in the employment actions of government officials, it specifically indicated when judicial scrutiny is, and is not, appropriate:

> *When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

461 U.S. at 146 (emphasis added).[25] *Connick* thus makes clear that where, as here, an employment action is based on an employee's beliefs or association relating to matters of "political . . . concern," judicial scrutiny is appropriate.[26]

The Court of Appeals' expressed desire to minimize judicial oversight of public employment, *see* 868 F.2d at 954, therefore cannot justify closing the courthouse doors to employees who claim that they have been penalized for their beliefs and association with respect to matters of political concern. And, that court's apprehension that every employment decision made by a member of the in-party might be challenged as politically discriminatory by a member of the out-party, *id.*, is no different in nature

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[25] *See also Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (judicial review of "the multitude of personnel decisions that are made daily by public agencies" is not appropriate "[*i*]*n the absence of any claim* that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights") (emphasis added).

[26] Although the quoted passage from *Connick* refers to employee "expression," the Court has always recognized that if employees are protected in their speech, they are equally protected in their beliefs and association. *See, e.g., Branti*, 445 U.S. at 515.

than the apprehension voiced by some employers that every employment decision made by a male might be challenged as sexually discriminatory by a female, or that every employment decision made by a white might be challenged as racially discriminatory by a Black. The judicial system is capable of determining whether a challenged employment action is in fact attributable to the improper motive alleged by the plaintiff;[27] and the reality that the determination may sometimes be difficult to make does not justify closing the courts to claims of political discrimination any more than it would justify doing so with respect to claims of discrimination based on race, sex, speech or other impermissible factors. *See Davis v. Bandemer*, 478 U.S. 109, 125 (1986) ("that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability").[28]

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[27] *See generally Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

[28] It is, after all, "the uniqueness of our Constitution and our system of judicial review [that] courts at all levels are available and receptive to claims of injustice, large and small, by any and every citizen of this country." *Rankin*, 483 U.S. at 392 (Powell, J., concurring).

Moreover, in this context as in others, the courts have ample mechanisms for terminating litigation in appropriate circumstances. Summary judgment is available where warranted, *see, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986). Also, even where a claim is *meritorious*, a public official sued in his individual capacity is entitled to qualified immunity if the right the official is alleged to have violated was not "clearly established," *see Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and a denial of qualified immunity is immediately appealable to the extent that it turns on a question of law, *see Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985). What is more, claims against a governmental entity under 42 U.S.C. § 1983 may be maintained only if the action complained of is attributable to the "final policymaking authority" of the entity, *see Jett v. Dallas Indep. School Dist.*, —— U.S. ——, 109 S. Ct. 2702, 2723-24 (1989); *St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Given these and other mechanisms, the Court of Appeals' fear that claims of political discrimination will overtax the courts is greatly exaggerated. And, in all events, the court's apprehension provides no principled basis for refusing to entertain these claims. *Connick, supra*; *Davis v. Bandemer, supra*, 478 U.S. at 126.

Second, Connick and *Rankin* indicate how the courts are to arrive "'at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 140 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). *See also Rankin*, 483 U.S. at 384. The role of the courts is to give "full consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, and then, to the extent that the government's interest is affected by the employee's speech, belief or association, to balance that interest against "[the employee's] interest in making her statement [or in holding to her association or beliefs]," *Rankin*, 483 U.S. at 388. In striking that balance, "the nature of the employee's expression" is to be considered, *Connick*, 461 U.S. at 150 & n.9, because it bears on "[the employee's] interest in making her statement," *Rankin*, 483 U.S. at 388.[29] But the severity of the employment sanction that has been imposed—be it suspension, termination, denial of promotion, or some other action—is not a factor to be weighed in the balance: the interest to be considered is the employee's interest in freedom of speech, association, and belief, not his or her interest in employment as such.

Thus, if the balance results in a determination that the interest of the State, as an employer, does not outweigh the interest of the employee in making a particular statement, holding a particular belief, or exercising freedom of association, it follows that the State, as employer, may

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[29] *See also Connick*, 461 U.S. at 152 ("We caution that a stronger showing [of harm to the government's interests] may be necessary if the employee's speech more substantially involved matters of public concern.").

not impose *any* employment sanction on the employee for that statement, belief, or association. As Justice Scalia has aptly put it, the question is "whether, given the interests of this [government] office, [the employee] had a *right* to say what she did—so that she could not only not be fired for it, but could not be formally reprimanded for it, or even prevented from repeating it endlessly into the future." *Rankin*, 483 U.S. at 399 (dissenting opinion) (emphasis in original).[30]

Branti defines the proper basis for applying these principles in a patronage case. Because "the state interest element of the [*Pickering/Connick*] test focuses on the effective functioning of the public employer's enterprise," *Rankin*, 483 U.S. at 388,[31] the *Branti* formulation, which asks whether the State has demonstrated "that party affiliation is an appropriate requirement for the effective performance of the public office involved," is entirely consistent with this Court's established jurisprudence in the area of public employment. If the State can make the necessary demonstration, party affiliation may be taken into account in determining who holds a particular office. If the State *cannot* demonstrate that party affiliation is an appropriate requirement for a position, then, insofar as the State's interest as an employer is concerned,

[30] If the law were otherwise, the courts would be called upon in every public employment case to decide whether the particular employment action taken by the government in response to an employee's protected conduct was the most appropriate response, or whether some other action—for example, suspension rather than dismissal—would have been more appropriate. That is not the role of the courts. To be sure, if the balance in a particular case favors the State, and the government therefore has a right to take steps to protect its legitimate interests at the expense of the employee's right of speech or association, it is incumbent upon the government to use the least restrictive means of protecting its interest as an employer, *see infra* at pp. 26-27, and this will in some cases require scrutiny of the *nature* of the action the government has taken. But that is a far cry from weighing the *severity* of the employment action, as such, in the *Pickering/Connick* balance.

[31] *See also id.* at 393 n.* (Powell, J., concurring).

party affiliation is no more relevant in determining whether one employee should be hired, rehired after layoff, promoted, or transferred into the position than in determining whether another employee should be removed from the position.

Inasmuch as the necessary demonstration has not been made for the positions involved in this case—which include equipment operator, garage employee, and Dietary Manager, *see supra* at p. 5 & note 2,[32]—it follows that the First Amendment infringement worked by the patronage practices at issue cannot be justified by any interest of the State as an employer.

B. The State's Interest in the Preservation of the Democratic Process is Not Served by Patronage Practices, and Even if it Were, the Use of Such Practices Would in Any Event Be Unjustifiable With Regard to Persons Already Employed by the Government

We turn now to the interest of the State in the preservation of the democratic process, which is the interest that Justice Powell championed in his dissents in *Elrod* and *Branti*. Moreover, it appears to be this interest, and not the interest of the State as an employer, that persuaded the court below and certain other courts of appeals to limit the reach of *Elrod* and *Branti*.

According to Justice Powell, patronage practices are essential incentives for participation in the political process by those who otherwise would not become politically active. *Elrod*, 427 U.S. at 379 (Powell, J., dissenting).

[32] The Court has recognized that seldom, if ever, can patronage be shown to contribute materially to the efficiency and effectiveness with which employees perform their duties. *See Elrod*, 427 U.S. at 364-67 (plurality opinion); *Branti*, 445 U.S. at 517-18 n.12. And, while there certainly are some positions for which patronage is justified as a means of ensuring "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration," *Elrod*, 427 U.S. at 367 (plurality opinion), that category is not a broad one, *see id.* at 367-68; *Branti*, 445 U.S. at 517-20, and the positions at issue here plainly are not within it.

This alleged increase in participation, he indicated, is in turn necessary to assure "stable political parties and avoid excessive political fragmentation." *Id.* at 383. And it was the position of Justice Powell that without stable political parties, the influence of single-issue special interest groups would predominate, and " 'unrestrained factionalism . . . [might] do significant damage to the fabric of government,' " *Branti*, 445 U.S. at 528 (Powell, J., dissenting) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).[22] More specifically, Justice Powell felt that it is at the state and municipal levels that the incentives of patronage are particularly necessary for the efficient functioning of political parties, because there otherwise would be little incentive for political involvement at those levels. *Elrod*, 427 U.S. at 384-85 (Powell, J., dissenting).

Justice Powell's concerns were, of course, unpersuasive to the majority of the Court in both *Elrod* and *Branti*. Justice Brennan's plurality opinion in *Elrod* acknowledged that "[p]reservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms," 427 U.S. at 368, but the plurality concluded that "[t]he [democratic] process functions as well without the practice [of patronage], perhaps even better, for patronage dismissals clearly also retard that process," *id.* at 369.

We find Justice Brennan's reasoning persuasive, and submit that employment patronage is, at bottom, a practice that in all of its manifestations profoundly disserves the democratic process. As the *Elrod* plurality stated, in

[22] Justice Powell also was concerned that with the hypothesized weakening of parties, and especially the weakening of party ties and identification with parties, the electorate would be less able "to choose wisely among candidates." *Branti*, 445 U.S. at 531 (dissenting opinion). He asserted that voters who "traditionally have relied upon party affiliation as a guide to choosing among candidates . . . [will be] less able to blame or credit a party for the performance of its elected officials." *Id.* "In local elections, a candidate's party affiliation may be the most salient information communicated to voters." *Id.* at 531 n.17.

an analysis that applies with equal force to *all* patronage employment practices:

> Patronage can result in the entrenchment of one or a few parties to the exclusion of others. And most indisputably, as we recognized at the outset, patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same.

Id. at 369-70. *See also* Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 1, 71 (1988) ("appointments or dismissals with political . . . conditions attached will . . . tend to distort or skew the political process in favor of entrenched interests"); J. James, *American Political Parties in Transition*, 85 (1974) (patronage incentives create party disunity by provoking quarrels over distribution of rewards, and repel from party activity those who might respond to other types of incentives); Sorauf, *The Silent Revolution in Patronage*, 10 Pub. Admin. Rev. 28, 29 (Winter 1960); Sorauf, *Patronage and Party*, 3 Midwest J. of Pol. Sci. 115, 123, 125 (1959) (patronage may create intra-party squabbles just as easily as intra-party cohesion or vitality).

Nor do we accept Justice Powell's assumption that without the availability of financial incentives in the form of patronage, citizens would not become involved in political activities. Even before *Elrod* was decided there had been a strong decline in the use of patronage in most jurisdictions, due to the adoption of merit systems as well as other factors, *see Elrod*, 427 U.S. at 354 and n.8 (plurality opinion), and we are aware of nothing to suggest that the democratic process has withered in those jurisdictions, *see id.* at 369. *See also* F. Sorauf & P. Beck, *Party Politics in America* 96-99 (6th ed. 1988) (in spite of impediments to the viability of state party organiza-

tions such as the extension of civil service systems, "state parties [are] in important respects healthier today than they [were] twenty years ago"; "state and local parties may be stronger today than they have been in many years"); Sorauf, *Patronage and Party, supra*, 3 Midwest J. of Pol. Sci. at 118-20 (decline of patronage "accompanied by no perceptible weakness of the parties"; "in states such as Wisconsin political parties have survived and achieved a certain measure of strength and discipline without the inducement of political appointments").

Although Justice Powell thought it "naive" to believe that people become involved in local politics out of a "public service impulse," *Elrod*, 427 U.S. at 385 (Powell, J., dissenting), the contention that only the prospect of material benefits draws people into local politics has been rejected by knowledgeable authorities. "[I]t is likely that the majority of persons who are active members of local party organizations seek neither material benefits nor the achievement of large ends, but merely find politics—or at least coming together in groups to work at politics—intrinsically enjoyable." J. Q. Wilson, *Political Organizations* 110 (1973). *See also* F. Sorauf & P. Beck, *Party Politics in America, supra*, at 110-13; R. Blank, *Political Parties* 133 (1980) (patronage explains no more than "a small portion of party activity"); Sorauf, *Silent Revolution, supra*, 10 Pub. Admin. Rev. at 31-33; Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chic. L. Rev. 181, 201-02 & nn.131-32 (1982).[34]

[34] Indeed, it has in recent years been questioned whether patronage employment practices are in fact effective in promoting political party participation by the beneficiaries of those practices. *See, e.g.*, Johnston, *Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage*, 73 Amer. Pol. Sci. Rev. 385, 389-90 & n.3, 390-91, 394-95, 397 (patronage "does not necessarily produce high levels of active support"; jobs "leave much to be desired as organization-maintaining incentives"); Gump, *The Functions of Patronage in American Party Politics: An Empirical Reappraisal*, 15 Midwest J. of Pol. Sci. 87, 94-97 (1971); Sorauf, *Silent Revolution, supra*, 10 Pub. Admin. Rev. at 30, 33 ("Patronage no longer is the potent inducement to party activity it once was."); Sorauf, *Patronage and Party, supra*, 3 Midwest J. of Pol. Sci. at 120-21.

Furthermore, the "party-building" rationale posited by Justice Powell is not "unrelated to the suppression of ideas," as it must be in order to justify an infringement of First Amendment rights. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). To the contrary, not only does that rationale relate to the *content* of political belief and association, but its very purpose is *to induce individuals to alter their political beliefs and associatons.* This rationale thus stands in sharp contrast to the kinds of government purposes generally accepted as compelling in the First Amendment context.

For example, if the State takes the position (rightly or wrongly, depending on the nature of the position involved, *see supra* at pp. 20-21) that only a Democrat properly can perform a certain job, the State's purpose is not to influence people to become Democrats (although that may certainly be the effect of its actions), but rather to select the best person for the job. The governmental purpose thus invoked, *if supported by the facts*, is unquestionably legitimate, and its proper reach is clearly defined. The "party building" rationale offered by Justice Powell, on the other hand, is based solely on the content of political beliefs and association; it has as its very purpose the enhancement or diminution of particular political beliefs and associations; and it is potentially unlimited in its ramifications.[35] As one commentator has noted:

> [The State's asserted interest in] induc[ing] time and money to political campaigns[] is dependent on the coercive effect of the patronage practice at issue. Yet that coercive effect is the very reason patronage is presumptively hostile to the Constitution. Thus it

[35] For example, on Justice Powell's reasoning it would appear that electoral victors would not violate the First Amendment if they were to pay cash bonuses, out of government funds, to their supporters.

> would be contradictory to argue that patronage actions short of dismissal do not have a significant coercive effect while simultaneously asserting the need to coerce partisan support.

Note, *First Amendment Limitations on Patronage Employment Practices, supra*, 49 U. Chic. L. Rev. at 200 n.120.

In short, the State's interest in the preservation of the democratic process is not served (indeed, it is disserved) by employment patronage, and thus this interest does not provide any justification for the use of patronage in making employment decisions. It is important to point out, however, that this conclusion does not mean that all patronage practices are constitutionally proscribed. As previously indicated, there is under *Branti* a significant class of positions—including most "policymaking" positions—as to which the use of patronage may be justified by the State's interest *as an employer*. There simply has been no demonstration that the preservation of the democratic process generally, or of political parties specifically, requires a broader range of patronage than this.

But if the Court should conclude otherwise, and find some legitimacy in Justice Powell's "party-building" rationale, it then would be necessary to determine *which* additional patronage practices should be sanctioned. Indeed, Justice Powell himself declared only that this asserted governmental interest should lead to "allowing *some* patronage hiring practices," *Elrod*, 427 U.S. at 382 (Powell, J., dissenting) (emphasis added). *See also id.* at 387 (Powell, J., dissenting) (criticizing plurality because "no alternative to *some* continuation of patronage practices is suggested") (emphasis added). The note of caution in those statements is dictated by the settled prescript that when limitations on freedom of belief and association are permissible, the government must accomplish its legitimate purpose by the least restrictive means available. As the Court has declared: "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that

broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). *See also Elrod*, 427 U.S. at 362-63 (plurality opinion); *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1168 (1988); *Roberts v. United States Jaycees, supra*, 468 U.S. at 623; *Buckley v. Valeo*, 424 U.S. 1, 29 (1976); *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). *Cf. Ward v. Rock Against Racism*, —— U.S. ——, 109 S. Ct. 2764, 2758 n.6 (1989).

Accordingly, if the Court were to conclude—contrary to our submission—that some patronage employment practices other than those permitted by *Branti* are necessary to insure the survival of "stable political parties," the foregoing principle would mandate that the line be drawn at patronage *hiring*, and that the use of patronage not be allowed with regard to persons *after they have been hired.* It strains credulity to assert that the hypothesized governmental interest in the survival of political parties requires that such parties be allowed not only to assure their followers of preference in hiring, but also to assure them that patronage will dictate who is to be rehired after layoff, promoted, transferred, or otherwise favored or disfavored after hire. *See* Gump, *The Functions of Patronage in American Party Politics: An Empirical Reappraisal*, 15 Midwest J. of Pol. Sci. 87, 106 (1971) ("for the overwhelming number of [patronage] jobs it is the original preferment, not the continuation of the grantee in the job, which is a valuable resource for the [party] chairman"). Such an all-encompassing use of patronage simply is not the least restrictive means of protecting the viability of political parties.

Furthermore, the use of patronage with respect to those already employed by the government is in other respects more objectionable than the use of patronage in hiring. Although the First Amendment injury inflicted by patronage does not vary depending on the nature of the employment action involved, it cannot be denied that the use of patronage to stunt the careers of persons al-

ready hired is more "intrusive," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (plurality opinion), than the use of patronage to determine who will be hired in the first place.

Moreover, a system that rewards or punishes employees for the degree of political support and activism they demonstrate *while in the public employ* inevitably puts pressure on such employees to demonstrate political loyalty by using their government positions for the benefit of a political party. One need not be omniscient to recognize that public employees, knowing that their job security and aspirations for advancement will be determined by their demonstrated loyalty to the party, will in some cases be impelled to serve the party (rather than the public) not only off the job, but on the job as well, by providing favors to members of the party or otherwise using their positions to benefit the party. In this respect patronage conflicts not only with "[the] demonstrated interest in this country that government service should depend upon meritorious performance rather than political service," *Connick*, 461 U.S. at 149, but also with the distinct and equally important interest that public employees not be seen to be "practicing political justice" in performing their duties. *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973).[36]

For these reasons, if the Court were to determine that the alleged interest of the government in using patronage as a means of fostering the democratic process is sufficient

[36] Our position in this regard should not be misunderstood. We certainly carry no brief for federal or state laws that prohibit *voluntary* political activities by public employees, and we reject the notion that to allow public employees, *as citizens*, to engage in voluntary political activities is tantamount to allowing government positions to be used for such activities. Our point is simply that if public employees are told, through operation of a patronage system, that their career opportunities are dependent on demonstrated political loyalty, the employees will be impelled to demonstrate that loyalty not only through outside political activities, but through conduct in their jobs as well.

to justify "some patronage hiring practices," *Elrod*, 427 U.S. at 382 (Powell, J., dissenting), beyond those already permitted by *Elrod* and *Branti*—a position we strongly believe should not be adopted—the line should in any event be drawn at hiring, and the Court should proscribe the use of patronage with respect to persons already employed in positions for which political affiliation is not an "appropriate requirement," *Branti, supra*.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed to the extent that it requires the dismissal of any of plaintiffs' claims.

Respectfully submitted,

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(1) (3)

Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents,

and

MARK FRECH, *et al.*,
Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is it constitutional to deny a public employee a promotion due to his or her political beliefs or his or her party affiliation?
2. Is it constitutional to deny a public employee a transfer due to his or her political beliefs or his or her party affiliation?
3. Is it constitutional to deny a qualified applicant an opportunity for public employment due to his or her political beliefs or his or her party affiliation?
4. Is it constitutional to condition promotion or transfer of public employees upon political support of, or financial contribution to, a favored political party or candidate?
5. Is it constitutional to condition obtaining public employment itself upon political support of, or financial contribution to, a favored political party or candidate?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioners/Cross-Respondents:
CYNTHIA RUTAN, FRANKLIN TAYLOR, individually and in behalf of state employees under the jurisdiction of the Governor desiring promotions and transfer, DAN O'BRIEN and RICKY STANDEFER, individually and in behalf of persons laid off and not rehired by agencies under the jurisdiction of the Governor.[1,2]

Petitioner:
JAMES MOORE, individually and in behalf of persons desiring employment in agencies under the jurisdiction of the Governor and potential state employees denied benefits and persons denied employment.[2]

Respondents/Cross-Petitioners:
THE REPUBLICAN PARTY OF ILLINOIS and EACH COUNTY OF ILLINOIS by DON W. ADAMS and IRVIN SMITH, individually and as representatives of all Republican State Central Committee and County Central Committee members;

[1] Cross-Respondents Standefer and O'Brien in this case claimed they were not recalled to state employment after lay-off due to their political affiliation. The Seventh Circuit reversed the dismissal of their claims holding the claims were political discharge cases falling under *Elrod* v. *Burns*, 427 U.S. 347 (1976). Cross-Respondents Standefer and O'Brien did not seek review of the Seventh Circuit's ruling as to them, but they are before this Court because this Court has granted the Cross Petition for Writ of Certiorari.

[2] The District Court failed to consider whether the petitioners may properly present this case as a class action. The Seventh Circuit Court of Appeals held this did not deprive that court of jurisdiction and proceeded to consider the claims presented by petitioners and cross-respondents. (A. 7).

JAMES THOMPSON, individually and as Governor of the State of Illinois;

MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY, individually and in their official capacities;

GREG BAISE, as representative of all Directors, Heads or Chief Executive Officers, since February 1, 1981, of State of Illinois Departments, Boards, and Commissions under the jurisdiction of the Governor; and

LYNN QUIGLEY, as representative of all liaisons since February 1, 1981, between the Governor's Office of Personnel and State of Illinois Departments, Boards and Commissions under the jurisdiction of the Governor.

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' BRIEF ON THE MERITS

OPINIONS BELOW

The initial opinion of the Court of Appeals for the Seventh Circuit is reported at 848 F.2d 1396 (7th Cir. 1988) and is reprinted in the appendix to the Petition for Certiorari, p. A-1. The opinion issued *en banc* is reported

at 868 F.2d 943 (7th Cir. 1989) and is reprinted in the appendix to the Petition for Certiorari, p. B-1.

The decision and opinion of the United States District Court for the Central District of Illinois is reported at 641 F.Supp. 249 (C.D. Ill. 1986) and is reprinted in the appendix to the Petition for Writ of Certiorari, p. C-1.

JURISDICTION

This cause arose under 42 *United States Code* 1983, 1985. The United States District Court for the Central District of Illinois had jurisdiction under 28 *United States Code* 1331, 1343. On July 11, 1986, the District Court granted Respondents' motion to dismiss.

The Court of Appeals for the Seventh Circuit had jurisdiction of this cause under 28 *United States Code* 1291. On June 8, 1988, the Court of Appeals held the denial of Petitioners Rutan and Taylor's promotions and transfer due to their political affiliation was not unconstitutional unless the denials constituted constructive discharge. Judge Ripple dissented.

The Court remanded the claims of Cross-Respondents Standefer and O'Brien that they had not been recalled to employment to see if their situations constituted coercion as prohibited by *Elrod v. Burns*, 427 U.S. 347 (1976).

The Court held the denial of an opportunity for employment due to Petitioner Moore's political affiliation was constitutional. Judge Ripple dissented.

On August 17, 1988, the Court of Appeals granted Petitioners' and Cross-Respondents' suggestion for rehearing *en banc*.

On February 16, 1989, the Court of Appeals sitting *en banc* (Judges Wood and Flaum not participating) entered a judgment and opinion substantially the same as the initial opinion. Judge Ripple again dissented, joined by Judge Cudahy, as to the holding regarding Petitioners Rutan and Taylor's claims. Judge Ripple further dissented from the affirmation of the dismissal of Petitioner Moore's claim.

This Court has jurisdiction to review this case under 28 *United States Code* 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment
To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 *United States Code* 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 *United States Code* 1985

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or

of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Illinois Revised Statutes, Ch. 127, Sec. 63b102

63b102. Purpose
Sec. 2. Purpose. The purpose of the Personnel Code is to establish for the government of the State of Illinois a system of personnel administration under the Governor, based on merit principles and scientific methods.

STATEMENT OF THE CASE

This case was decided on a motion to dismiss. When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations of the complaint are deemed admitted with every reasonable doubt resolved in favor of the pleader. See *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). (The Complaint filed in this matter is to be found in the Appendix to Respondent's Response to Petition for Certiorari, hereinafter referred to as R.A.)

This litigation was brought by five individuals who have been denied important aspects of employment due to their political beliefs and political associations. They have not supported the Republican Party or its candidates.

All positions in question, with the exception of that held by Ricky Standefer, fall under the civil service provisions of the Personnel Code of the State of Illinois. *Ill. Rev. Stat.*, ch. 127, sec. 63b101.

Cynthia Rutan has worked for the Department of Rehabilitation Services of the State of Illinois since 1974. (Disability Claims Specialist). She has repeatedly applied for promotion, but has been denied those promotions because of her political affiliation. She is qualified for the positions she sought. Those promotions have been given to persons less qualified than Cynthia Rutan. Cynthia Rutan has not supported the Republican Party or its candidates, but those persons put in the positions for which she applied have supported the Republican Party. Otherwise, she would have been promoted. (R.A., pp. 13-14).

When Cynthia Rutan was advised about the way this system operated, she went to the Sangamon County Republican Central Committee and obtained the promotion form which reads:

SANGAMON COUNTY REPUBLICAN CENTRAL COMMITTEE
200 SOUTH SECOND STREET, SPRINGFIELD, IL 62701

PRINT OR TYPE
NAME_____DATE_____

ADDRESS_____ PRECINCT_____ TOWNSHIP_____

TELEPHONE_____

VOTING ADDRESS IF DIFFERENT_____ PRECINCT_____

AGE___ DATE OF BIRTH_____ SOCIAL SECURITY #_____

PRESENT POSITION_____ DEP'T_____

DESIRED POSITION_____ DEP'T_____

HOW LONG IN PRESENT POSITION_____

REASON FOR CHANGE_____ ARE YOU QUALIFIED?___

GIVE NAME OF TEST TAKEN_____ GRADE_____ DATE_____

FOR WHICH PARTY DID YOU VOTE IN PRIMARY ELECTIONS?
1984_____1982_____1980_____1978_____

NOTE: (if under age, question applies to parents.)
Enter name here:_____

DO YOU HOLD A MEMBERSHIP IN THE LINCOLN CLUB OF SANGAMON COUNTY? _____

WOULD YOU BE WILLING TO BECOME AN ACTIVE SANGAMON COUNTY REPUBLICAN FOUNDATION MEMBER? _____ (The foundation is a voluntary, financial assistance organization)

WOULD YOU BE WILLING TO CANVASS AND WORK YOUR PRECINCT OR NEIGHBORHOOD FOR CANDIDATES THE CENTRAL COMMITTEE RECOMMENDS AS QUALIFIED FOR LOCAL, STATE, AND NATIONAL OFFICES? _____

I AFFIRM THAT THE INFORMATION GIVEN ON THIS APPLICATION HAS BEEN ANSWERED HONESTLY TO THE BEST OF MY ABILITY.

_____
Signature of Applicant

I RECOMMEND THE ABOVE APPLICANT BECAUSE _____

_____

_____
Signature of Precinct Committeeman

(R.A., pp. 14, 24).

Franklin Taylor has worked for the Illinois Department of Transportation as an equipment operator since 1969. In July of 1983, he applied for a vacant lead worker position which would have been a promotion for him. He was denied that promotion due to his political affiliation. Medford Phillips was promoted to that vacancy. He was less qualified and had less seniority than Franklin Taylor, but Phillips had the sponsorship of the Fulton County Republican Party for that promotion. Franklin Taylor did not have that sponsorship. (R.A., pp. 14-15).

Franklin Taylor also sought a geographical transfer from Fulton County to Schuyler County, the county in which he resides. He was denied that transfer due to his political affiliation. The transfer would have placed his work site much closer to home. He was denied that transfer because the Republican County Chairmen in those two counties would not approve it. (R.A., p. 15).

Ricky Standefer was hired in a temporary position at the Illinois State Garage on May 12, 1984. In November of that year, Ricky Standefer and five other temporary employees at that Garage were laid-off. The five other employees were offered other jobs with the State because they had the sponsorship of the Republican Party. Ricky Standefer was not offered another job due to his political affiliation. He had voted in the Democratic primary. (R.A., p. 15).

Dan O'Brien began to work for the State of Illinois as a dishwasher at the Lincoln Development Center of the Department of Mental Health and Developmental Disabilities on April 1, 1971. Over the years, he continued to work at the Center and was promoted. On April 5, 1983, he was laid off; at that time he was a Dietary Manager I. (R.A., pp. 15-16).

Under the Personnel Rules adopted pursuant to the Illinois Personnel Code, Dan O'Brien could have been recalled within two years of that lay off. Had he been recalled, he would not have lost any seniority or other employment benefits. (R.A., p. 16).

In December of 1984, Chuck Cicci, business administrator for the Lincoln Developmental Center, told Dan O'Brien he was going to be recalled to work as soon as his recall was approved by the Governor's Office of Personnel. In February of 1985, Superintendent Johnson, head of the Lincoln Developmental Center, told O'Brien the Governor's Office of Personnel had denied his recall from lay-off. (R.A., p. 16). He was denied that recall due to his political affiliation.

Dan O'Brien had voted in the Democratic primary election. (R.A., p. 16).

Armed with the knowledge of how the system operates, he then worked to gain the support of Joe Sapp, the Logan County Republican Chairman. Soon after receiving Sapp's support, he was hired by the Department of Corrections. However, he lost 12 years of seniority and he received less salary than he would have earned had the Governor's Office of Personnel not rejected his recall from layoff as a Dietary Manager I. (R.A., p. 16).

James Moore was honorably discharged from the United States Army in 1958 and, thus, qualifies for veteran status in seeking employment with the State of Illinois. Since 1978 he has repeatedly sought employment with the State, particularly for available positions within the Department of Corrections, but has been denied all positions due to his political affiliation. When Petitioner Moore approached his State Representative who was a Republican about getting a job, he received the following letter:

(Letterhead Of)

GENERAL ASSEMBLY
STATE OF ILLINOIS
ROBERT C. WINCHESTER
STATE REPRESENTATIVE – 59th DISTRICT

James W. Moore, Sr.
Route 3, Box 278
Golconda, Illinois 62938

August 15, 1980

Dear Mr. Moore:

In response to your July letter requesting employment with the State of Illinois, please be advised that there are over 1,100 applications on file at the Vienna Correctional Center. Of those, 450 have been strongly recommended by the precinct committeemen within the Republican organization. This represents requests for employment from the 12 counties in the 59th legislative district. . . .

. . .

I would suggest that you make contact with your precinct committeeman and your Republican County Chairman. You will have to receive the endorsement of the Republican Party in Pope County before I can refer your name to the Governor's office.

Sincerely,

/s/ Bob
Robert C. "Bob" Winchester
State Representative

RCW/jam

James Moore could not obtain the Republican County Chairman's signature due to his political affiliation. Jobs for which he had applied, and for which he was qualified, were filled with persons less qualified, but who were affiliated with the favored political party. (R.A., pp. 16-17, 25-26).

The system that denied the Petitioners and Cross-Respondents these important aspects of employment is relatively simple. There are more than 60,000 persons employed in the fifty departments, boards and commissions under the jurisdiction of the Governor of Illinois. Each year more than 5,000 of those positions are filled by promotion, transfer or hiring as a result of resignations, deaths, retirements, expansion of job positions, changes in job classifications and reorganizations. (R.A., p. 6).

On November 12, 1980, Respondent Thompson issued an Executive Order which formalized the employment system of his administration. (R.A., p. 6). It reads:

(Letterhead Of)

STATE OF [Seal] ILLINOIS
EXECUTIVE DEPARTMENT
SPRINGFIELD, ILLINOIS

EXECUTIVE ORDER Number 5 — (1980)

HIRING FREEZE

Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. All hiring is frozen. There will be no exceptions to this order without my express permission after submission of appropriate requests to my office. (R.A., p. 23).

Thereafter, Respondent Thompson delegated to employees in his office the power to implement this Order. Those employees came to be known as the "Governor's Office of Personnel." Actual implementation of that Order means that no position can be filled, either by promotion, transfer, recall from lay-off or hire, without the permission of

that office. The decision to fill a particular position is based upon political factors, namely, the contribution of money to the Republican Party and the support of that party and its candidates. Those who are politically favored are promoted, transferred, recalled from layoff or hired. Those who are not so favored are not promoted, transferred, recalled from layoff or hired.

The Governor's Office of Personnel uses employees in each department, known as liaisons, to keep the Office advised as to positions available or about to be made available. The liaison also facilitates the actual promotion, transfer, recall from lay-off or hire of those approved by the Governor's Office of Personnel. (R.A., p. 8).

In deciding whether to fill a particular position with a particular person, the Governor's Office of Personnel reviews the person's primary voting record, the support that person has given to Republican candidates and the financial contributions made by that person to the Republican Party and Republican candidates. The voting records of relatives, their support of candidates and their financial contributions also play a role in determining whether the person will be given a position. (R.A., p. 7).

In making the review, the Office uses the local county Republican Party organizations (there are 102 counties in Illinois). The form obtained by Petitioner Rutan, reprinted *supra*, is used by the local county organizations. After review and verification of the information on the form, the county Republican Party organizations decide whether to forward a recommendation supporting the person to the Governor's Office of Personnel. (R.A., p. 7).

If the home county organization does not recommend the person, nothing is forwarded to the Governor's Office. Once a recommendation is received by the Governor's Office of Personnel, that Office then decides whether the

person will be promoted, transferred, recalled from layoff or hired.

The cost of operating this system of employment is two million dollars of taxpayers money—money paid by Independents, Democrats and Republicans not of the same political persuasion as the incumbent administration, as well as, by supporters of that administration. (R.A., pp. 12, 20). While this tax money is collected in a non-partisan fashion, the system it supports is designed to interfere with the free functioning of the electoral process. (R.A., p. 18).

The Plaintiffs are direct victims of this employment system.

The District Court dismissed all claims.

The Seventh Circuit, *en banc*, remanded the claims of Ricky Standefer and Dan O'Brien for a determination on the facts as to whether their situations were of the type considered inherently coercive and violative of the First Amendment in *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976). Ricky Standefer and Dan O'Brien did not join in the Petition for Certiorari, but are before this Court on the granting of the Cross Petition for Certiorari.

The Seventh Circuit held that the other employment actions were constitutional unless they constituted constructive discharge. The Court further held the federal courts were not open to James Moore's claim, thus, giving *de facto* constitutional protection to all systems of hiring based upon political beliefs and affiliation.

Judges Ripple and Cudahy dissented as to the standard of constructive discharge imposed on the Rutan and Taylor claims. Judge Ripple further dissented as to Moore's claim urging the matter be remanded for development of the factual record as to the particular employment system in this case.

SUMMARY OF ARGUMENT

Petitioners and Cross-Respondents were denied important aspects of employment due to their political beliefs and political affiliations. By Executive Order and implementation of an employment system, the Respondents have done what could not be done by statute: namely, limit promotions, transfers, recalls from lay-off and employment itself to those who are politically favored. The inherent unconstitutionality of the system is apparent, for the Respondents could not post a vacant position listing as a qualification a $500.00 contribution to a particular political party or a particular political candidate. But, *sub silencio*, that is what has happened in Illinois.

Petitioners and Cross-Respondents have not supported the Republican Party and its candidates either by financial "contributions" or "volunteer" work. Nor have they voted in the Republican primary. Just as Petitioners and Cross-Respondents have the right to support political candidates and associate with a political party, Petitioners and Cross-Respondents also have the right under the First Amendment to the United States Constitution not to support a particular political party or its candidates and the right to refrain from voting in a particular party primary.

As a result of the exercise of those First Amendment rights, Respondents denied Petitioners Rutan and Taylor promotions, Petitioner Taylor a transfer, Cross-Respondents Standefer and O'Brien recall from lay-off, and Petitioner Moore a job itself. These acts are coercive in nature and directly interfere with Petitioners' and Cross-Respondents' First Amendment rights.

When First Amendment rights are at stake, this Court has not drawn any distinction between an employee's rights and an applicant's rights.

There is no overriding or vital state interest that justifies this interference with Petitioners' and Cross-Respondents' First Amendment rights. Allowing the incumbent administration to appoint its policy makers, who have the ability to discharge subordinates if they do not carry out the policy, insures effective and efficient government. In fact, the interest of the state would have been better served by the granting of the benefits these Petitioners and Cross-Respondents sought, for Petitioners and Cross-Respondents were more qualified than the politically favored persons who received the benefits.

The employment system in this case does not strengthen the two party system, but rather is intended to strengthen one party by coercing persons to vote in that party's primary, not out of choice, to contribute money to candidates whose views they do not support, and to work for a political party with whom they do not wish to associate. But that is the price that must be paid if those persons are to be promoted, transferred, recalled from lay-off or hired.

This Court should not relegate First Amendment rights in the employment context to a position inferior to other constitutional rights, particularly employment rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The employment system at issue in this case means that Democrats, Independents and Republicans holding political views different from the incumbent administration need not apply for promotion, transfer, recall from lay-off or hire, for they simply will not receive those benefits of employment. That violates the First Amendment right of freedom of association.

ARGUMENT

I. Introduction.

In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), this Court recognized:

> that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office or that no federal employee shall attend Mass or take any active part in missionary work.

This Court applied that principle to state legislatures in *Wieman v. Updegraff*, 344 U.S. 183 (1952). The Illinois General Assembly could not constitutionally enact a law providing that no Democrats or Independents or Republicans with political views differing from the incumbent administration shall be employed, promoted or transferred by the state or a law providing that only those favored by the Republican Party could be employed, promoted or transferred by the State.

But that is exactly what has happened by Executive Order and implementation of an employment system that limits jobs, promotions, recall from lay-off and transfers to those politically favored by the incumbent admininstration. What the state could not do lawfully by statute the state has done indirectly by Executive Order and practice. Regardless of the method, the impact on First Amendment rights is the same. Both are unconstitutional.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court said:

> . . . The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. 427 U.S. at 361.

At the outset, Petitioners and Cross-Respondents recognize that an incumbent administration should have the ability to fire and hire policy makers of their political persuasion where political affiliation is a legitimate factor to be considered. *Branti v. Finkel*, 445 U.S. 507 (1980). The Petitioners and Cross-Respondents simply do not fall into that category.

II. Traditional Analysis Of First Amendment Public Employment Cases.

In those cases raising First Amendment issues, this Court has repeatedly used the following analysis:

1. All persons have the right to freedom of speech and freedom of association as guaranteed by the First Amendment of the United States Constitution.

2. If the state is to interfere with those First Amendment rights it must have a compelling or overriding state interest.

3. If the state has such an interest, the interference with the right must be clearly defined in the least restrictive terms possible. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Eu v. San Francisco County Democratic Central Committee*, ____ U.S. ____, 109 S.Ct. 1013 (1989).

> In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government interest by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

Throughout this litigation, the Petitioners and Cross-Respondents have framed their position and argument

within this traditional analysis, but Respondents have failed to do so.

III. The Conduct Of The Petitioners And Cross-Respondents Is Protected By The First Amendment To The United States Constitution.

Long ago this Court reeognized that public employees, just as private citizens, enjoy the First Amendment rights of freedom of speech and freedom of association. *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Rankin v. McPherson*, 483 U.S. 387 (1987).

Basic to the exercise of First Amendment rights is the right to support a particular political party which espouses particular ideas and the right to support particular candidates for public office. *Elrod v. Burns*, 427 U.S. 347 (1976); *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F.2d 561 (7th Cir. 1972); *Tashjian v. Republican Party of Connecticut*, 477 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, ___ U.S. ___, 109 S.Ct. 1013 (1989). Such association is fundamental to our democratic way of life.

This Court has also recognized the right protected by the First Amendment to refrain from supporting a particular party or candidate. The holdings in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), make it abundantly clear that silence or not supporting a particular party or candidate is protected by the First Amendment.

In striking down that provision of an agency shop agreement which required a teacher to contribute support to an ideological cause he might oppose, this Court in *Abood* after citing *Buckley v. Valeo*, 424 U.S. 1 (1976), said:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. *For at the heart of the First Amendment is the notice that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.* See *Elrod v. Burns, supra*, 427 U.S. at 356 357, 95 S.Ct. at 2681-82; *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542; *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628. 431 U.S. at 234-35.
>
> (emphasis added).

The Petitioners and Cross-Respondents were denied important aspects of employment due to their political beliefs and association.

The Respondents have never contested the fact that the conduct of the Plaintiffs falls within the protection of the First Amendment to the United States Constitution.

IV. The Denial Of Promotion, Transfer, Recall From Lay-Off And Employment Itself Interferes With Petitioners' And Cross-Respondents' First Amendment Rights.

A. Public Employees

Because the actions of the Respondents implicate the First Amendment rights of the Petitioners and Cross-Respondents, the standard of review is one of exacting scrutiny. *Elrod v. Burns*, 427 U.S. 347 (1976); *Eu v. San Francisco Democratic Central Committee*, ___ U.S. ___, 109 S.Ct. 1013 (1989).

In *Elrod*, this Court (plurality opinion) rejected beginning the analysis of the patronage system with the judgment of history or the actual operation of the practice but rather held the inquiry began with identification of the constitutional limitations imposed by the system and said:

> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the outparty maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 634-635, 46 L.Ed.2d 659 (1976). *Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.* 427 U.S. at 355-356. (emphasis added).

Those limitations are no different in the instant case. Simply change the words "maintain their jobs" to "obtain a promotion, transfer, recall from lay-off or a job itself." The effect on the individual is the same. People often compromise to obtain what they want, but compromise is not possible in this case. Not only must the Petitioners and Cross-Respondents reject or abandon their beliefs, but they must support that in which they do not believe in order to obtain a promotion, transfer, recall from lay-off or employment. They must vote in the favored party's primary, not by choice. They must work for the election of candidates whose views they do not accept. They must contribute money to support a party with whom they do not wish to associate.

> Patronage, therefore to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis, supra*, at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief of public employment on political faith. *Elrod v. Burns*, 427 U.S. at 357.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the petitioner argued that the respondents were not subjected to political coercion, that those employees being displaced simply did not have proper political sponsorship. This Court rejected that argument saying:

> While it would perhaps eliminate the more blatant forms of coercion described in *Elrod, it would not eliminate the coercion of belief* that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job. More importantly, petitioner's interpretation would require the Court to repudiate entirely the conclusion of both Mr. Justice BRENNAN and Mr. Justice STEWART that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs. 445 U.S. at 516-517. (emphasis added)

In this case, not only is the sponsorship required, the blatant forms of coercion are also present. The coercion in this case is no less than in *Elrod*.

The Respondents have taken the position throughout this litigation that denial of promotion, transfer, recall from lay-off and a job itself does not rise to the level of a constitutional violation.

The Seventh Circuit recognized that failure to transfer or promote *was coercive* but found it "significantly less coercive or disruptive than discharging an employee" (A-25).

In the Seventh Circuit, there are now degrees of coercion or disruption under the First Amendment—some constitutional and some not. Prior to its decision in this case, the Seventh Circuit had an outstanding record in protecting public employees' First Amendment rights.[3] The Seventh Circuit decision in this case is, indeed, an aberration.

The Seventh Circuit's approach amounts to distinction without meaning and emasculates this Court's holdings in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980). Anyone who has supervised an employee knows there are two forms of punishment—each intended to bring behavior into desired conformity. Denying an employee a raise by denying promotion can have a far more devastating effect than a two day suspension. Yet under the Seventh Circuit's view only the latter would be actionable. *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). Both are forms of punishment. The key factor is that both are intended to bring behavior into conformity with desired conduct: financial "contributions" to and "volunteer" support of the favored party and affiliation with that party by voting in that party's primary. The employment system in this case is every bit as coercive as that in *Elrod*—even more so because these are civil service jobs.

The Seventh Circuit tried to distinguish this case from its prior decisions by claiming the denial of promotion and transfer was not directed against Petitioners Rutan and Taylor, but was incidental to favoring other persons. This

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[3] *Mueller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (written reprimand); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (transfer); *Knapp v. Whitaker, et al.*, 757 F.2d 826 (7th Cir. 1985) (transfer); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983) (transfer); *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984) (denial of promotion; summary judgment on the facts for defendants affirmed but underlying premise was that the complaint stated a cause of action); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (harassment after public employee had run for public office and made statements on public issues and had supported another candidate after she lost the primary).

Court rejected that argument in *Branti v. Finkel*, 445 U.S. 507 (1980). The Third Circuit followed *Branti* in *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987) saying:

> The defendants also assert that *Elrod* and *Branti* should not be extended to cover plaintiffs who were not demoted for political opposition; but rather, were demoted simply to make room for political supporters. The problem with this assertion, however, is that an alternative view of a demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252-53, 82 L.Ed.2d 462 (1984).

and further concluded:

> Although *Pickering*, *Elrod*, and *Branti* each involved dismissals from employment, the rationale of each dealt with the constitutionality of action adversely affecting an interest in employment in retaliation for an exercise of first amendment rights. As we read those cases, *the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech.* "The first amendment is implicated whenever a government employee is disciplined for his speech." *Waters v. Chaffin*, 684 F.2d 833, 837 n. 9 (11th Cir. 1982) (demotion and transfer). See *Robb v. City of Philadelphia*, 733 F.2d 286, 295 (3d Cir. 1984) (transfer and refusal to promote); *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983) (suspension). 823 F.2d at 731 (emphasis added).

See also, *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988).

The firings of the Plaintiffs in *Elrod v. Burns*, 427 U.S. 347 (1976), and in *Branti v. Finkel*, 445 U.S. 507 (1980),

can also be viewed as incidental to the employers' desire to hire their own people. That did not pass constitutional muster then and should not now.

The denial of promotion, transfer, and recall from layoff are forms of coercion.

The denial of a promotion to Petitioner Cynthia Rutan directly impacts the amount of money she will take home each month. Assume the promotion results in a $200.00 per month salary increase and could lead to further promotions. That could mean the difference between her child attending college or not. Increased salary directly affects other employment benefits: pension, Social Security benefits, disability payments, Worker's Compensation's benefits and life insurance coverage (through the state) for they are based on percentages of salary.

Also important is the effect on state government. The denial of her promotion affects the quality of government, for Cynthia Rutan was more qualified than those actually promoted. The same is true as to the denial of Petitioner Franklin Taylor's promotion.

The denial of the geographical transfer to Petitioner Franklin Taylor means countless hours a year on the road, away from family and other pursuits, driving to and from work and there is also the monetary impact: the cost of mileage and the wear and tear on his vehicle.

The coercion of the system is especially apparent in the case of Cross-Respondent Dan O'Brien. Close to the end of the two years in which he had the right to be recalled, the business administrator of the mental health center in which Dan O'Brien had worked told O'Brien he was going to be recalled. Two months later, the superintendent of that center told O'Brien the Governor's Office of Personnel rejected his recall. Subsequently, Dan O'Brien sub-

mitted to the system. He did what he had to do to get the support of Joe Sapp, the Republican County Chairman in Logan County. When he obtained that support, he was hired by the Department of Corrections. However, due to the rejection of his recall by the Governor's Office of Personnel, he still lost his twelve years of seniority and other benefits he had gained while with the Department of Mental Health and Developmental Disabilities.

This employment system is a phenomenal violation of the First Amendment. The State of Illinois is a major employer. With the exception of Standefer's position, these are civil service jobs, not the temporary type of position before this Court in *Elrod*. Thousands of Illinois citizens are being subjected to coercion—to change their political beliefs and demonstrate that change by acts of support of that in which they do not believe—in order to get promoted or transferred or hired.

The Respondents' acts toward these public employees are coercive and strike at the very heart of the First Amendment. They were intended to force the Petitioners and Cross-Respondents to vote in the Republican primary and to give money and other support to the Republican Party. The Respondents have denied Cynthia Rutan, Franklin Taylor, Ricky Standefer and Dan O'Brien important benefits of employment due to their political beliefs and affiliations.

B. Applicant For Public Employment

This Court has already extended full First Amendment protection to applicants. This Court has made no distinction between an employee and an applicant when First Amendment rights are at stake.

The explanation for not making any distinction between "applicant" First Amendment rights and "employee" First Amendment rights is found in *Perry v. Sinderman*, 408 U.S. 593 (1972), where the teacher may or may not have had re-employment rights. But assuming that teacher Sinderman had no employment rights the Court held:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.
>
> We have applied this general principle to denials of tax exemptions, *Speiser v. Randall, supra*, unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398, 404-405, 83 S.Ct. 1790, 1794-1795, 10 L.Ed.2d 965, and welfare payments, *Shapiro v. Thompson*, 394 U.S. 618, 627, n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600; *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754; *Wieman v. Updegraff*, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216; *Shelton v. Tucker*, 364 U.S. 479, 485-486, 81 S.Ct. 247, 250-251, 5 L.Ed.2d 231; *Torcaso v. Watkins*, 367 U.S. 488, 495-496, 81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982; *Cafeteria & Restaurant Workers*

v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288, 82 S.Ct. 275, 281, 7 L.Ed.2d 285; *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *Elfbrandt v. Russell*, 384 U.S. 11, 17, 86 S.Ct. 1238, 1241, 16 L.Ed.2d 321; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629; *Whitehall v. Elkins*, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228; *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508; *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811. We have applied the principles regardless of the public employee's contractual or other claim to a job. 408 U.S. at 597.

In *Torcaso v. Watkins*, 367 U.S. 488 (1961), Torcaso applied to become a notary public. He was rejected at the application stage because of his refusal to sign an oath due to religious beliefs. The highest court in Maryland had affirmed the denial of Torcaso's notary commission holding he was not compelled to believe or disbelieve; he simply could not hold public office unless he signed the oath. This Court struck down the oath requirement saying:

> *The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.* This was settled by our holding in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216. 367 U.S. at 495-496. (emphasis added).

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court struck down a loyalty oath requirement that applied to both applicants for employment and employees. The statutory and regulatory oath requirements sought "to *bar* employment," 385 U.S. at 609, for association which could not be prohibited consistent with the First Amendment.

The holding in *Perry v. Sindermann*, 408 U.S. 593 (1972), provided the precedent for this Court's holding in *Elrod v. Burns*, 427 U.S. 347 (1976). The plurality opinion relied upon two grounds: 1) the impact of patronage upon freedom of belief and association; 2) the imposition of an unconstitutional condition on the receipt of a public benefit as prohibited by *Perry v. Sinderman*, 408 U.S. 593 (1972). The concurring opinion did not comment upon the first ground but relied heavily upon the second.

Branti v. Finkel, 445 U.S. 507 (1980), can clearly be viewed as a hiring case for the whole purpose of the contemplated employment actions was to make way to hire those with the proper political sponsorship. If political hiring is constitutional, then *Branti* was decided incorrectly.

This Court also addressed the question of political hiring in *Branti* by way of footnote, 14, 445 U.S. at 519 and said:

> As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation:
>
> "Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations emerging into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. *By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime?* No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans)." 457 F. Supp., at 1293, n. 13 (emphasis added).

It was clear from the comments of the dissenters in *Elrod* and in *Branti* that the Court believed that no real

distinction exists between the constitutional rights of those seeking employment and those already employed.

This Court most recently addressed an applicant's rights in the First Amendment context in *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136 (1987), and in *Frazee v. Illinois Dept. of Employment Security*, ___ U.S. ___, 109 S.Ct. 1514 (1989). In *Hobbie*, the State of Florida had denied Hobbie unemployment compensation benefits when she was fired because she refused to work on her Sabbath (she was a Seventh Day Adventist). Citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and quoting *Thomas v. Review Board of the Indiana Employment Security Div.*, 450 U.S. 707 (1981), this Court said:

> *Where the state conditions receipt of an important benefit* upon conduct proscribed by a religious faith, *or where it denied such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.* 107 S.Ct. at 1049 (emphasis added by the Court).

Certain Courts of Appeal have also refused to draw a distinction between an applicant and an employee.

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff applied for forty positions at the Library of Congress. He claimed that he was denied those positions due to his affiliation with the Young Socialist Alliance. The District Court dismissed this claim. The D.C. Circuit reversed, holding:

> The district court's judgment on this claim must be reversed and the claim must be remanded for consideration of whether Clark met his burden of proof under the standard applicable to first amendment-based employment discrimination claims. 750 F.2d at 101.

In *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977), *cert. denied*, 434 U.S. 892 (1977) the Third Circuit found discharge and hiring comparable:

> In general, a state may not condition hiring or discharge of an employee in a way which infringes his right of political association. 555 F.2d at 392.

In *Cullen v. New York State Civil Service Commission*, 435 F.Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2nd Cir. 1977), a case remarkably like the present case, the Court held that conditioning the hiring and promotion of persons for county jobs on political campaign contributions to local politicians was plainly unconstitutional. The Court recognized there was no right to public employment but held:

> . . . denial of employment or promotion may not be conditioned on the making of a financial contribution to a political party. 435 F.Supp. at 552.

In *Thorne v. City of El Segundo*, 726 F2d 459 (9th Cir. 1983), the Court held that inquiry into the private, off-duty personal life of an applicant for employment as a police officer violated her rights to privacy as guaranteed by the First Amendment. The Court said:

> A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment. 726 F.2d at 469.

Petitioner Moore has been denied public employment due to his political beliefs and his political affiliation. He simply could not get the signature *required* to get a job, that of the Republican County Chairman. Should he now do what Cross-Respondent O'Brien was compelled to do—"volunteer' to work for the politically favored candidates, "contribute" money to the politically favored party and vote in that party's primary? Should the State be allowed

to require such a debasement and degradation of one's beliefs and ideals as a prerequisite to employment?

The implications of the Seventh Circuit's ruling goes far beyond Petitioner Moore. By outright dismissal of Moore's claim, the Seventh Circuit has said there is no system of political hiring that can ever be unconstitutional.

This effectively bars thousands from pursuing their chosen profession or employment for so many fields are exclusively or predominantly public employment: law enforcement, education, conservation, corrections, mental health, public aid, regulation of professions and regulation of certain industries. In certain geographical areas of Illinois, public employment is the major source of employment. For persons trained in these professions one cannot easily find a non-public job nor is it easy, in several parts of the state, to find a job in the private sector which pays a living wage.

Under these circumstances, conditioning employment itself upon adherence to certain political beliefs and affiliation is highly coercive and intended to bring behavior into desired conformity. It violates Petitioner Moore's First Amendment rights.

V. The Respondents Have Not Put Forth Any Compelling Or Overriding State Interest To Justify Infringement Of The Petitioners' And Cross-Respondents' First Amendment Rights.

At no time in this litigation have the Respondents put forth *any* state interest, let alone a compelling or overriding state interest, to justify the interference with the exercise of First Amendment rights.

The Seventh Circuit Court of Appeals suggested possible state interests when it referred to Justice Powell's

dissent in *Branti v. Finkel*, 445 U.S. 507 (1980). Those suggested state interests were rejected in both *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Ironically the dissent of Mr. Justice Powell in *Elrod* was based on the assumption that patronage hiring played a "limited role . . . in most government employment." 427 U.S. at 388. That assumption does not apply in the instant case. No position is filled by promotion, transfer, recall from lay-off or hire without the permission of the Governor's Office of Personnel.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court recognized the history of patronage, but rejected the proposition that patronage promoted efficient and effective government saying:

> At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those basis in fact exist. 427 U.S. at 366.

The exemption of policy making positions certainly gives the incumbent administration the ability to govern as it wishes. Those exempt persons set the policy. Subordinate employees who do not carry out the set policy can be fired for insubordination. But it serves no state interest that a road equipment operator (Petitioner Taylor) or a garage worker (Cross-Respondent Standefer) or a dietary manager (Cross-Respondent O'Brien) be required to support a particular political party. All that serves the state is that they perform their assigned duties well.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court noted that the state interest standard was not met:

> to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. 445 U.S. at 517, fn. 12.

In the instant case, efficient and effective government would have been served by the promotion of Petitioners Rutan and Taylor for they were more qualified than those persons actually promoted. State interests would have been served by the Department of Mental Health and Developmental Disabilities not losing Cross-Respondent O'Brien's twelve years of experience in food service.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court also rejected the argument that the patronage system strengthened the two party political system saying:

> And most indisputably, as we recognized at the outset, *patronage is a very effective inpediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same.* Indeed, unlike the gain to representative government provided by the Hatch Act in *CSC v. Letter Carriers*, *supra*, and *United Public Workers v. Mitchell*, *supra*, the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights. 427 U.S. at 369-370. (emphasis added)

In this case the employment system strengthens the incumbent party and uses two million dollars of tax money to do it.

This Court in *Branti v. Finkel*, 445 U.S. 507 (1980) further noted that:

> Government funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party simply because that party has control of the government. 445 U.S. at 517, fn. 12.

But that is exactly what has happened in this case.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court cautioned against confusing partisan interests with state interests. Partisan loyalty must not be confused with governmental loyalty. The Plaintiffs can be patriots loyal to the concept of effective and efficient government to serve the people of Illinois. That patriotism is not to be confused with the requirement of total loyalty to one political party or one set of political candidates. Partisan loyalty and governmental loyalty merging into one entity from the basis of the totalitarian state.

How ironic that in the instant case the Respondents have used the employment system to coerce the merger of partisan loyalty with loyalty to the state. In essence, the Respondents require a loyalty oath in order to be promoted, transferred, recalled from lay-off or hired. (See Sangamon County Republican Party promotion application form, p. 7 *supra*). The Petitioners and Cross-Respondents must vote in the Republican primary. They must contribute to the party and they must work for the endorsed party candidates. This is not just the saying of a few words under oath. Affirmative acts must be performed—acts that run counter to the Petitioners' and Cross-Respondents' political beliefs. The consequences of not conforming is adverse employment action.

The State of Illinois has expressed its state interest when it enacted into law a merit system of employment. All employment transactions in the instant case, with the

exception of Cross-Respondent Standefer, fall under the civil service system established by the Personnel Code, *Ill. Rev. Stat.*, Ch. 127, Sec. 63b101. The very purpose of that civil service system is set forth in the statute itself:

> 63b102. Purpose
>
> Sec. 2. Purpose. The purpose of the Personnel Code is to establish for the government of the State of Illinois a system of personnel administration under the Governor, *based on merit principles and scientific methods*. (emphasis added).

"Merit principles" of personnel administration has been defined and interpreted by Illinois Courts in the following manner:

> Such principles are few and relatively well known. Cardinal among them is that the purpose of civil service laws is to provide a method which ensures *competent service* for governmental bodies, *free of the spoils system. Fahey v. Cook County Police Department Merit Board*, 21 Ill. App. 3d 579, 315 N.E.2d 573, 578 (1st Dist., 1974). (emphasis added)

See also *Hacker v. Myers*, 33 Ill. App. 2d 322, 179 N.E. 2d 404 (1st Dist. 1961); *Burke v. Civil Service Commission*, 41 Ill. App. 2d 446, 190 N.E. 2d 841 (3rd Dist. 1963). The state has identified its interests in a merit employment system free of the spoils system. State interests articulated through the enactment of statute simply do not include the insidious patronage system operated by Respondents.

The patronage employment system serves the interests of the Republican Party and its candidates, but the interests of the Republican Party and its candidates are not the interests of the State. There are no overriding or compelling state interests to justify the interference with First Amendment rights that exist in this case. Because of this Petitioners and Cross-Respondents need not go on to the

third aspect of traditional First Amendment case analysis, namely, that the interference with the right must be *clearly* defined in the least restrictive terms possible. But Petitioners and Cross-Respondents do note it is not clearly defined as to how much of a "contribution" will get Cynthia Rutan the desired promotion or how much "volunteer" work will get Franklin Taylor the transfer to his resident county. If there is an overriding state interest then the Respondents must clearly articulate what is required to obtain a promotion, a transfer, recall from lay-off or a job. This focus demonstrates the inherent unconstitutionality of the system. Imagine the Department of Corrections posting a vacant position and including in the posting that a contribution of five hundred dollars to a particular party is necessary to get the job, or, in the alternative, one hundred hours of work canvassing the precinct in the last primary election. But, *sub silencio*, that is what is happening in Illinois.

VI. This Court Must Not Relegate First Amendment Rights To A Position Vastly Inferior To Rights Guaranteed Under Other Amendments To The United States Constitution.

Circuit Courts of Appeal have never applied a constructive discharge standard to a person denied an employment benefit on the basis of race or sex in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Riordan v. Kempiners, et al.*, 831 F.2d 690 (7th Cir. 1987) (salary difference of state employees—sex); *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (harassment and retaliation of a fire department employee—race).

The Courts of Appeal have repeatedly recognized a cause of action brought under 42 *United States Code* 1983

for failure to hire due to race or sex. In *Van Houdnos v. Evans, et al.*, 807 F.2d 648 (7th Cir. 1986), the Seventh Circuit reversed a directed verdict for defendant and reinstated a jury verdict for the plaintiff who was denied a position at the Illinois State Museum due to her sex. In *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533 (11th Cir. 1988), the Court reversed the District Court's summary judgment for the defendant as to certain individual applicants' claims that they were denied employment due to their race. In *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986), the Court reversed the dismissal of the claims of certain applicants for public employment and the dismissal of claims of public employees denied promotion due to race.

There is no rational basis to relegate the right to freedom of speech and freedom of association to an inferior position vis-a-vis the right to be free from discrimination based upon race or sex in employment matters. Decades before blacks were considered persons and over a hundred years before women were granted the right to vote, this nation established the right to freedom of speech and freedom of association. Those rights form the foundation of representative democracy. Those rights must not be relegated to a position inferior to Fourteenth Amendment.

This Court has repeatedly struck down other state limitations on the granting of benefits when those limitations violate other constitutional provisions. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court struck down a one year residency requirement for the obtaining of state welfare benefits holding that if the purpose of the law was to chill assertion of constitutional rights it was patently unconstitutional. In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), this Court struck down a New Mexico statute denying a tax exemption to Vietnam veterans who resided in that state after May 8, 1976, on

the grounds the state may not favor established residents ("its own") over new residents. This Court also struck down a New York veterans' preference hiring statute when that state limited the preference to veterans who had served in the armed forces while a resident of that state. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

With all due respect for these other rights guaranteed by the Amendments to the Constitution, the First Amendment rights form the underpinning of our system of government. In this year, the two hundredth anniversary of the Bill of Rights, this Court should not relegate First Amendment rights to a position inferior to those other rights.

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1956).

The whole concept of freedom of association negates the coupling of denial of an employment benefit with disapproval of political beliefs and affiliation or with coercion to change those beliefs and association.

CONCLUSION

Petitioners and Cross-Respondents have the right to hold particular political beliefs and to associate politically according to those beliefs without experiencing denial of important aspects of employment.

Petitioners and Cross-Respondents pray that this Court hold each Petitioner and Cross-Respondent has stated a

cause of action and apply the rule of law set forth in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980), namely, that the Respondents cannot deprive Petitioners and Cross-Respondents promotion, transfer, recall from lay-off and employment itself on the basis of political belief and association.

Petitioners and Cross-Respondents pray this Court remand this case for full hearing on the Petitioners' and Cross-Respondents' claims.

Respectfully submitted,

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QUESTIONS PRESENTED

Plaintiffs allege that, from among a pool of qualified applicants for hiring, promotions, transfers and rehiring, the State Officials have favored those who are Republicans or Republican supporters, or friends or relatives of Republicans, or sponsored by Republicans or friends of the Governor, or sponsored by members of the Illinois legislature who are deemed to be friends or supporters of the Governor.

1. Do the First and Fourteenth Amendments prohibit elected state and local officials from taking these kinds of considerations into account when they hire nonpolicymaking public employees?

2. Do the First and Fourteenth Amendments prohibit elected state and local officials from taking these kinds of considerations into account when they grant desired promotions or transfers to existing nonpolicymaking public employees, or rehire former nonpolicymaking employees who have been laid off?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents,

and

MARK FRECH, *et al.*,

Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON THE MERITS OF RESPONDENTS/CROSS-PETITIONERS

STATEMENT OF THE CASE

A. The Complaint

On July 1, 1985 plaintiffs Cynthia Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer and James Moore (collectively, "plaintiffs") filed this purported class action against the Republican Party of Illinois and of each county of Illinois, two Republican Party officials, Governor James R. Thompson and seven former or current state government officials.[1] Plaintiffs allege that the State Officials and the other defendants created an employment system in which certain personnel decisions are "substantially motivated" by considerations of friendship and politics (R.A. 7, ¶ 11f),[2] so that political and financial supporters of the Republican Party "are favored in regard to State of Illinois employment." (R.A. 2, ¶ 1.)

[1] This brief is submitted on behalf of James R. Thompson, Mark Frech, Greg Baise, William Fleischli, Randy Hawkins, Kevin Wright, James Reilly and Lynn Quigley (collectively, "the State Officials"). The Republican Party of Illinois and of each county of Illinois, Don W. Adams, and Irvin Smith are also Respondents/Cross-Petitioners in this proceeding. Counsel for those parties have indicated that they intend to adopt the Brief On The Merits filed by the State Officials.

[2] A copy of the complaint has been reproduced in the Respondents' Appendix ("R.A."), attached to the State Respondents' Brief In Opposition, at R.A. 1-32. The opinions of the District Court and the Seventh Circuit will be cited herein by their placement in the Petitioners' Appendix ("Pet. App."), attached to the Petition for Writ of Certiorari. The District Court's opinion also is reported at 641 F. Supp. 249. The decision of the Seventh Circuit *en banc* is reported at 868 F.2d 943. Plaintiffs' brief on the merits will be cited herein (Pl. Br.). In addition, Independent Voters of Illinois, *et al.* ("IVI"), the National Education Association, the AFL-CIO, and the North Carolina Professional Firefighters Association have submitted amicus briefs in support of plaintiffs' claims. Those briefs will be cited herein (IVI Br.), (NEA Br.), (AFL Br.) and (NCF Br.), respectively.

Plaintiffs allege that as part of these considerations in the employment process, the State Officials make use of voting records and also take into account an individual's "financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level." (R.A. 7, ¶ 11g.) The alleged purpose and effect of defendants' conduct is to "limit State employment and the benefits of State employment to those who are politically favored . . . and thereby provide the Governor, the Republican Party and Republican candidates for political office with political campaign contributors and to discourage opposition to the Governor and the Republican Party in elections." (R.A. 8, ¶ 11k.)

The considerations which the State Officials allegedly take into account in the employment process are not limited to partisan support for the Republican Party. Instead, they encompass a variety of factors which extend beyond partisan political affiliation. Plaintiffs allege that (R.A. 7, ¶ 11f):

> "In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the 'Governor's Office of Personnel' are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson."

Thus, plaintiffs do not allege in their complaint a strict partisan patronage system for making decisions relating to hiring, promoting, transferring and rehiring public employees. Rather, they allege that these decisions are substantially affected by consideration of the applicants' or employees' (1) affiliation with or financial support of the Republican Party,

or (2) friendship with a Republican, or (3) family relationship with a Republican, or (4) sponsorship by a Republican, or (5) friendship with Governor Thompson, or (6) support of Governor Thompson, or (7) sponsorship by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Governor Thompson, or (8) some combination of these factors. (See R.A. 7, ¶ 11f.) Under the alleged system complained of, the favored applicant for hiring, promotion, transfer or rehiring may have no direct connection whatever to the Republican Party (*e.g.*, a friend of a Democratic member of the Illinois legislature who is a friend of the Governor).

Further, plaintiffs do not allege in their complaint that those who were selected instead of plaintiffs for hiring, promotion, transfer and rehiring were unqualified for the positions they obtained. Nor do plaintiffs claim that the successful candidates failed to meet the requirements of the Illinois Personnel Code ("the Code"). *Ill. Rev. Stat.*, ch. 127, ¶ 63b101 *et seq.* (1985).

The specific allegations of the complaint regarding each plaintiff are as follows:

Plaintiff Moore alleges that he unsuccessfully sought employment with the state from 1978 through mid-1985. (R.A. 17, ¶ 23b.) During that seven-year period, two relatives of Republican Party officials and one person allegedly affiliated with the Republican Party were "hired by State government in positions for which Plaintiff Moore was qualified." (R.A. 17, ¶ 23e.) Moore alleges that he received a letter from a state representative suggesting that he contact local officials of the Republican Party (R.A. 17, ¶ 23c; R.A. 25-26), and that when he did so, he was told that he needed to get two signatures to obtain a job. (R.A. 17, ¶ 23d.) Moore does not allege that the candidates who were hired instead of Moore were unqualified, or that he was more qualified than those other candidates.

Plaintiff Rutan alleges that since the Fall of 1981, she has applied for promotions to supervisory positions within her department. (R.A. 14, ¶ 19b.) Rutan does not allege that these positions were awarded to unqualified employees, but rather that the positions she sought were filled by persons who were less qualified than she but favored by the Governor's Office of Personnel. (R.A. 14, ¶ 19g.) Rutan claims that in 1983 she obtained a copy of a form allegedly used by defendants in promoting employees. (R.A. 14, ¶ 19e; R.A. 24.) The form asks qualified applicants if they are willing to work for or contribute money to the Republican Party. (R.A. 24.) The form also asks applicants for promotions to indicate the name, date, and grade of the test taken under the Code which qualifies them for the desired promotion. (*Id.*)

Plaintiff Taylor alleges that he failed to obtain a promotion which he claims was awarded to another state employee "who was less qualified and had less seniority" but who had the support and approval of the Republican Party. (R.A. 15, ¶ 20c.) Taylor does not allege that the person who received the promotion was unqualified. Taylor also claims that he did not receive a desired transfer to another county because the transfer was opposed by local Republican Party officials. (R.A. 15, ¶ 20f.) Taylor does not allege that another employee (whether more, equally or less qualified) received the transfer which he desired, or that any other employee was transferred to any other county.

Plaintiff Standefer alleges that he was hired in a temporary position in the Spring of 1984 and, along with five other employees, was laid off in November 1984. (R.A. 15, ¶ 21a, b.) Standefer does not challenge the propriety of the layoff. Standefer claims that the other five individuals "had the support of the Republican Party" and received new offers for state employment, but that Standefer—who allegedly once had voted in the Democratic primary at some unstated time in the past—did not receive another job offer. (R.A. 15, ¶ 21c-e.) However, Standefer does not allege that the other

five employees held temporary positions, as he did, which limited his term of employment to a period of six months. *See Ill. Rev. Stat.* ch. 127, ¶ 63b108b.9 (1985). Nor does Standefer claim that the persons who were offered other jobs were unqualified for the state jobs, or that he was more qualified than they for the jobs.

Plaintiff O'Brien alleges that he was laid off from a state job in April 1983, after 12 years of state employment. (R.A. 15-16, ¶ 22a, b.) He does not challenge the layoff; nor does he claim that another person was hired to replace him. O'Brien claims that he was not recalled to his previous position, and that several months later—after he obtained the support of the Chairman of the Republican Party of Logan County—he received another state job with less seniority and salary. (R.A. 16, ¶ 22d, e, g.)

Plaintiffs do not claim that they have been discharged, demoted, harassed or punished in any way for their political beliefs or affiliation. Rutan and Taylor do not allege that their titles, responsibilities, salaries or employment status were in any way affected when they failed to obtain desired promotions or transfers. Neither Standefer nor O'Brien contends that he was laid off due to his political affiliation or nonaffiliation. Plaintiffs do not allege that they were coerced to work for, vote for, or contribute money to the Republican Party or its candidates.

Nonetheless, plaintiffs claim that the consideration of friendship and "politics" as alleged in the complaint violates their rights to freedom of speech and association. (R.A. 17, ¶ 24a.) As relief from this allegedly unconstitutional employment system, plaintiffs seek $1.02 billion in compensatory and punitive damages and the imposition of a receivership "to take control of and operate the hiring and promotion system of the State of Illinois for departments, boards and commissions under the jurisdiction of the Governor." (R.A. 22, ¶ 12.)

B. Proceedings in the District Court

The District Court dismissed the complaint in its entirety for failure to state a claim. (R. 73; R. 77, at 33-35.) *See* Pet. App. C-1. The District Court held that plaintiffs failed to state a claim under the First Amendment because their vague and inconclusive allegations that defendants used "political considerations" in hiring, promoting, transferring and rehiring state employees is distinct from the situation presented in *Elrod v. Burns*, 427 U.S. 347 (1976), in which this Court prohibited the dismissal of public employees based solely on their political affiliation. Pet. App. C-5; C-11.

The District Court determined that this Court's prior decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), did not govern plaintiffs' claims because "any incidental effect that might flow from the use of political considerations in [the challenged] employment decisions does not trigger the analysis of *Keyishian* and other cases that involve direct restrictions on speech." Pet. App. C-13. The District Court also held that plaintiffs' allegations that other candidates received the jobs or promotions which they themselves desired did not constitute "punitive personnel actions in retaliation for their exercise of protected First Amendment speech." Pet. App. C-10.[3]

[3] The District Court's dismissal of plaintiffs' complaint for failure to state a claim rendered it unnecessary to address the State Officials' claim of qualified immunity. The Seventh Circuit requested the District Court to address this claim on remand. Pet. App. A-30 n.6. Even if this Court determines that one or more of the plaintiffs have stated a claim, the requests for monetary relief must be dismissed under the doctrine of qualified immunity because the "rights" which plaintiffs assert in this case will have been established by this Court in this proceeding; they previously have not been recognized much less clearly and consistently established by the courts. *See Mitchell v. Forsyth*, 472 U.S. 511, 530-31 (1985); *Davis v. Scherer*, 468 U.S. 183, 191 (1984). In the alternative, the Court can order the District Court to consider this issue in the event a remand is necessary.

C. Proceedings in the United States Court of Appeals for the Seventh Circuit

By a divided vote, a panel of the Seventh Circuit affirmed the District Court's dismissal of plaintiff Moore's hiring claim, holding that the failure to obtain a particular position does not sufficiently affect First Amendment freedoms to state a constitutional claim. Pet. App. B-23-24. The panel remanded the claims of plaintiffs Rutan, Taylor, Standefer and O'Brien ("the employees") for a determination whether their failure to be promoted, transferred or rehired was "the substantial equivalent of dismissal." *Id* at B-23.[4]

After a rehearing *en banc*, the Seventh Circuit reinstated the panel majority's opinion virtually unchanged. Pet. App.

[4] The panel affirmed, without dissent, the District Court's dismissal on standing grounds of plaintiffs' allegations, as voters, that the alleged employment system deprived them of "equal access and effectiveness of elections." Pet. App. B-30. Following its prior decision in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988), and the decision of the District of Columbia Circuit in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the Seventh Circuit concluded that "the injury asserted in the complaint is not fairly traceable to the challenged action." Pet. App. B-31. The Seventh Circuit's subsequent *en banc* decision unanimously adopted this holding. Pet. App. A-32.

Plaintiffs have not sought review of the Seventh Circuit's decision on this issue, which is fully consistent both with this Court's precedents on standing and with decisions of other courts of appeals. Although plaintiffs' claim as voters is no longer a part of this case, amici IVI devote substantial portions of their brief to the argument that the employment practices alleged in the complaint deny "the public's rights to a free and fair political and electoral process." (IVI Br. 7; *see id.* at 14-18.) This argument is not relevant to the issues before the Court; it also is manifestly incorrect in light of this Court's decisions on standing and the Seventh Circuit's decision in *Shakman*, which IVI fails to cite in its brief. IVI's failure to cite *Shakman* hardly could have been an oversight; Mr. Shakman, one of the plaintiffs in that litigation, is himself a party to IVI's amicus brief.

A-1. Following its prior decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and the decision of the Sixth Circuit in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the Court of Appeals determined that the burdens which the alleged employment practices impose on the First Amendment rights of job applicants do not rise to the level of a constitutional deprivation. Pet. App. A-24. Drawing on the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1984), the Court reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." Pet. App. A-24. Furthermore, "[a]ny burden imposed on an employment applicant does not outweigh the significant intrusion into state government required to remedy such a claim." *Id.*

The *en banc* Court recognized that, with regard to the claims of the employees, it was undetermined "whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment." Pet. App. A-13. To resolve the constitutionality of the promotion, transfer, and rehiring claims alleged in the complaint, the Court of Appeals adopted the "substantial equivalent of dismissal" test enunciated in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). Pet. App. A-17.

Although the Seventh Circuit adopted the *Delong* analysis, it distinguished the allegations in this case from the claims of political retaliation that were at issue in *Delong*. This case does not involve allegations of adverse employment actions—like the involuntary transfer and reassignment in *Delong*—designed to punish employees for the exercise of free speech. Here, plaintiffs Rutan, Taylor, Standefer and O'Brien complain that other employees received more favorable treatment from their public employer. (R.A. 2, ¶ 1.)

In remanding this case for a determination of the employees' claims, the Court of Appeals expressed substantial doubt

that they could meet the *Delong* standard on the basis of the allegations stated in the complaint. Pet. App. A-25, 27-28, 29. Distinguishing those cases in which employees were punished for the exercise of protected speech, the Court emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Id.* at A-23 n.4.

One judge dissented as to the dismissal of plaintiff Moore's hiring claim. *Id.* at A-33. Two judges dissented from the majority's adoption of the "substantial equivalent of dismissal" standard to govern the employees' claims. *Id.*[5]

SUMMARY OF ARGUMENT

Plaintiffs apparently recognize that the factual allegations actually made in their complaint do not raise a constitutional issue under the doctrine of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Thus, in their brief, plaintiffs abandon those allegations, and they argue instead that this case involves the type of strict partisan political patronage system that was involved in *Elrod*. This argument directly conflicts with the allegations of plaintiffs' complaint.

The complaint alleges that certain employment decisions are "substantially motivated" by a myriad of considerations which include politics, family relations and friendships. This system obviously can cut across party lines. Plaintiffs now assert in their brief that the State Officials have used a strict political litmus test to exclude non-Republicans based solely

[5] Throughout this brief, we refer to Mr. Moore's claim as the "hiring claim." We frequently refer to the promotion, transfer and rehire claims of plaintiffs Rutan, Taylor, Standefer and O'Brien as "the employees' claims."

on party affiliation. (*Compare* R.A. 7, ¶ 11f *with* Pl. Br. 16.) Distorting the allegations in their complaint, plaintiffs assert in their brief that job seekers *must* vote in the Republican primary, contribute money to the Republican Party and volunteer to work for the Republican Party even to be considered for a job. (Pl. Br. 21.) Plaintiffs now proclaim—with no factual basis in their complaint—that all State of Illinois employees must take an oath of loyalty to the Republican Party in order to be hired, promoted, transferred or rehired. (Pl. Br. 35.)

Plaintiffs and their amici effectively ask this Court to pass on the constitutionality of a hypothetical "employment system" that bears little resemblance to the allegations of the complaint. At the time of the District Court's original dismissal of the complaint, plaintiffs declined to file an amended complaint, but instead elected to stand on the adequacy of their initial pleading. As a result, the legal significance of plaintiffs' claims must be determined by reference to the well-pleaded facts alleged in the complaint. Their attempt to raise claims in this Court which were not pleaded, litigated or decided in the Courts below should be rejected.

Part I of this brief discusses plaintiff Moore's hiring claim. We demonstrate that the First and Fourteenth Amendments do not prohibit elected state and local officials from using the kinds of considerations involved here when they hire public employees from a pool of qualified applicants. In both *Elrod* and *Branti*, the Court reviewed a strict partisan employment system which commanded the discharge of existing employees who were performing satisfactorily on the sole ground that they belonged to the "wrong" political party. *Elrod*, 427 U.S. at 349 (plurality opinion); *Branti*, 445 U.S. at 508. As a result of the strict nature of the system, the Court in *Elrod* found substantial support for its ruling in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and other decisions invalidating "loyalty oaths" as a condition for continued public employment. *See Elrod*, 427 U.S. at 357-

58 (plurality opinion). In *Elrod*, as in *Keyishian*, the public employer did not weigh relevant factors or even consider an employee's performance; the plaintiffs were discharged or threatened with discharge solely as a result of their political beliefs or affiliation. No such system is involved in this case.

In Part I A, we demonstrate that, contrary to the arguments of plaintiffs and their amici, the complaint does *not* allege a strict partisan political patronage system designed to reward Republicans and only Republicans with jobs. Plaintiffs have not alleged, for example, that Democrats, applicants recommended by Democratic office-holders, or applicants who have no political affiliation, are precluded from obtaining a state job based solely on their party affiliation or lack thereof. Thus, neither the hypothetical posited by the Court in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), nor the "loyalty oath" cases cited in *Elrod*, are relevant here.

In Part I B, we demonstrate that the principal concern underlying *Elrod*—that automatic partisan firing has a chilling effect on the First Amendment rights of the affected employees—is not implicated by the hiring decisions involved here. *Elrod*'s limitation on the most extreme manifestation of traditional patronage practice—the dismissal or threat of dismissal of existing employees—was based on the concern that employees will be discouraged from expressing their true political beliefs if it might cost them their jobs. *Elrod*, 427 U.S. at 359. Here, in contrast, the state's failure to hire an applicant such as Mr. Moore does not impose a comparable burden on First Amendment freedoms, and accordingly does not raise a constitutional issue.

Part II discusses plaintiffs' promotion, transfer and rehiring claims. In Part II A, we demonstrate that there is no cognizable claim for a failure to be promoted, transferred or rehired under the circumstances alleged in the complaint. Here, as in the hiring context, any limited burdens imposed on the First Amendment rights of the affected employees by

the use of considerations of friendship and politics among qualified employees do not give rise to a constitutional claim.

In addition, as we show in Part II B, there is a significant difference between plaintiffs' allegations that certain favorable employment decisions are "substantially motivated" by such considerations (R.A. 7, ¶ 11f), and cases involving the imposition of punitive employment sanctions in direct retaliation for political belief or expression. See Pet. App. at A-23 n.4; *Id.* at C-10-11, 13. There is no allegation in this case that plaintiffs Rutan, Taylor, Standefer or O'Brien have been reprimanded, demoted or in any way punished in retaliation for their political beliefs. The employees complain only that other qualified employees have been favored with promotions, transfers or rehire decisions which plaintiffs hoped to obtain. No strict partisan political qualification is involved. The First Amendment does not require a ban on friendship and political considerations under these circumstances.

In Part III, we demonstrate that prudential considerations weigh strongly against extending the reach of *Elrod* to the dramatically different employment practices alleged here. Interference by federal courts with the operations of state and local government will be increased significantly if *Elrod* is extended to cover all prospective employees who are not hired and all employees who fail to obtain a desired promotion, transfer or rehire. Such a sweeping rule of constitutional law would require federal courts to serve as "platonic guardians" over the personnel practices of fifty states and thousands of local government offices.

Plaintiffs and their amici suggest that such judicial oversight not only is proper, but is essential to ensure that elected officials do not favor certain qualified employees on the basis of friendship or "politics," just as they cannot discriminate on the basis of race or religion. However, unlike racial or religious discrimination, there is no constitutional principle which prohibits friendship, "politics" and other "connections" from being considered in public employment.

These types of considerations traditionally have been, and remain today, an integral part of our political and social landscape. Thus, the decisions of this Court and constitutional prohibitions outlawing discrimination on the basis of race and religion do not support plaintiffs' claims in this case.

In the end, the First Amendment does not preclude elected state and local officials from considering friendship and "politics" in the employment contexts raised in this case. The Court's narrow ruling in *Elrod* should not be expanded in the manner and to the extreme degree urged by plaintiffs.

ARGUMENT

I.

THE HIRING PRACTICES ALLEGED IN THE COMPLAINT ARE WELL WITHIN CONSTITUTIONAL LIMITS.

In *Elrod v. Burns*, this Court held that the First and Fourteenth Amendments prohibit the dismissal or threat of dismissal of nonpolicymaking employees based solely on party affiliation. *Elrod*, 427 U.S. at 375 (concurring opinion). In *Branti v. Finkel*, this Court reaffirmed that political affiliation cannot be the sole basis for depriving some incumbent public employees of continued employment. *Branti*, 445 U.S. at 516.

This case presents the Court with an issue not decided in those cases: whether the First and Fourteenth Amendments to the Constitution prohibit elected state and local officials from taking into account friendship and political connections at the opposite end of the employment spectrum—in the hiring of public employees.[6] We demonstrate

[6] Plaintiffs and their amici suggest that this issue is foreclosed by the Court's decisions in *Elrod* and *Branti*. (Pl. Br. 29-30; NEA Br. 16; IVI Br. 21; AFL Br. 19-20; NCF Br. 7, 8.) *Elrod* and *Branti* themselves expressly refute this suggestion. Although Justice Brennan's plurality opinion in *Elrod* recognized that "political patronage comprises a broad range of activities," including placing loyal supporters in government jobs, he emphasized that the only issue before the Court was "the constitutionality of dismissing public employees for partisan reasons." 427 U.S at 353 (Brennan, J., plurality opinion). Justice Stewart's narrow concurring opinion, joined by Justice Blackmun, confirms that the limited reach of *Elrod* does not extend to the employment practices alleged in this case. *Id.* at 374-75 (Stewart, J., concurring). Likewise, in *Branti*, the Court expressly stated that the only practice at issue was the firing of public employees solely for partisan reasons. 445 U.S. at 513 n.7. The Court therefore declined to address the defendant's contention that the hiring of employees in the public defender's office warranted a different result. *Id.*

below that plaintiff Moore's hiring claim properly was dismissed because the type of hiring practices alleged and their effect, if any, on applicants like Moore each distinguish *Elrod* and require a different result.

A. The *Elrod* Principle Does Not Preclude Consideration Of The Friendships And Politics Of Qualified Applicants In The Hiring Process.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court addressed for the first time the constitutionality of one aspect of "political patronage." In *Elrod*, three employees in the Cook County Sheriff's Office had been fired and a fourth was in imminent danger of being fired "solely because they did not support and were not members of the Democratic Party, and had failed to obtain the sponsorship of one of its leaders." *Id.* at 351. The plaintiffs contended that this practice deprived them of rights guaranteed under the First and Fourteenth Amendments. *Id.* at 350. A closely divided Court held that nonpolicymaking, nonconfidential employees cannot be discharged or threatened with discharge solely because of their political affiliation or nonaffiliation. *Id.* at 375 (Stewart, J., concurring).[7]

In *Elrod*, it was undisputed that the plaintiffs were discharged *solely* because of their political affiliation or nonaffiliation. 427 U.S. at 350, 351, 375. The nature of the "political considerations" at issue in *Elrod* was simple, straightforward and unforgiving: employees either affiliated

[7] The Court reaffirmed *Elrod* in *Branti v. Finkel*, 445 U.S. 507 (1980), holding that an assistant public defender who is satisfactorily performing his job cannot be discharged solely because of his political beliefs. *Id.* at 517. Reformulating the policymaker exception recognized in *Elrod*, the Court found that a public employee's political affiliation or beliefs "cannot be the sole basis for depriving him of continued employment," *id.* at 516, unless the government agency can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

with or obtained the sponsorship of the Democratic Party or lost their jobs. *Id.* at 351. In light of the strict party requirement in that case, the plurality found substantial support for its ruling in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183 (1952); and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *See Elrod*, 427 U.S. at 357-58 (plurality opinion).[8]

The considerations challenged here are fundamentally different from the strict partisan practice condemned in *Elrod*. Here, there is no allegation that the State Officials' employment decisions are based solely on political affiliation. *See* Pet. App. C-11. Unlike *Elrod*, where the dismissals were dictated solely by reference to party affiliation, the considerations alleged in the complaint are not absolutely determinative of the hiring process and are not limited to affiliation with the Republican Party. (*See* R.A. 7, ¶ 11f.)

Thus, plaintiff Moore has not alleged that job recommendations are a prerequisite to be hired for a state job; nor are such recommendations alleged to be the exclusive province of the Republican Party. Instead, hiring decisions are alleged to be "substantially motivated" by considerations of friendship, politics and other personal relationships. These considerations include whether the applicant or employee is a relative or friend of a Republican (which presumably includes Democrats, Independents and persons not connected to any party). Thus, plaintiff Moore alleges that two of the three people hired instead of him were relatives of Republicans (R.A. 17, ¶ 23e); he does not allege that they were Republicans, or were not Democrats or Independents.

[8] In both *Wieman* and *Keyishian*, the Court recognized that political association could not, by itself, require or threaten the dismissal of a public employee. *See Elrod*, 427 U.S. at 358-59. In *Mitchell*, the Court posited a strict hypothetical singling out certain groups for adverse treatment solely on the basis of race, religion or political party affiliation.

Likewise, under the allegations of the complaint, these considerations include sponsorship by any member of the Illinois General Assembly (without regard to party affiliation) who is "deemed to be a friend or supporter of Defendant Thompson." (R.A. 7, ¶ 11f.) Plaintiffs do not allege in their complaint—nor could they—that Governor Thompson's "friends" and "supporters" are limited to members of the Republican Party.

Moreover, unlike *Elrod*, where employees were fired without any regard for their performance on the job, the employment practices alleged in the complaint are entirely consistent with the mandate of the Illinois Personnel Code.[9] Plaintiff Moore does not allege that the successful candidates for the job he sought were unqualified within the meaning of the Code, or even that he was more qualified than the applicants who were hired by the state.

[9] The Code, which establishes certain procedures to determine qualifications for state jobs, does not dictate which person or persons will be awarded a job (or transfer or promotion) from a pool of qualified candidates. The Code ensures only that candidates who are considered for positions have passed the appropriate examination. For example, in the hiring context, the Code provides for "open competitive examinations to test the relative fitness of applicants for the respective positions." *Ill. Rev. Stat.* ch. 127, ¶ 63b108b.1 (1985). The Code requires that successful candidates (*i.e.*, candidates who have passed the requisite examination) be placed on eligibility lists in order of their respective performance on the examination. *Id.* at ¶ 63b108b.3. The Code operates in similar fashion regarding promotions, transfers, and rehires. *E.g.*, *Id. at* ¶¶ 63b108b.2, 108b.11, 108b.12. State agencies may hire applicants from the appropriate eligibility list. *Id.* at ¶ 63b108b.5. Having established the prerequisites for qualification, the Code goes no further, affording state agencies the discretion to hire employees from among the Code-qualified candidates. Plaintiffs do not allege that defendants have hired, promoted, transferred or rehired any person not on the appropriate eligibility list.

The alleged "patronage system" which Moore attacks is nothing like the strict partisan test at issue in *Elrod*, or the loyalty oaths which were struck down in *Wieman* and *Keyishian*. Plaintiff Moore claims only that other qualified applicants were hired by the state based, in part, on a variety of factors that include family, friendships, politics and other connections. *(See* R.A. 17, ¶ 23e.) These hiring practices, which comport with the state Personnel Code, are not proscribed by the First Amendment.

The Court of Appeals for the Sixth Circuit upheld the consideration of politics, friendship and family relations in hiring public employees in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986). In *Avery*, the plaintiff alleged that her application for employment was not considered because she was unconnected with the defendants' "network" of friends, relatives or "friends or relatives of political allies." *Id.* at 234. The evidence in *Avery* demonstrated that the "network" had a strongly partisan character. During a period of nearly eight years, only 10 of the 432 persons hired by the defendants were Democrats. *Id.* at 235. One of the defendants in *Avery* explained this preference in plainly partisan terms: " ' [A]ll things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected.' " *Id.*

Rejecting the plaintiff's claim that *Elrod's* prohibition of political dismissals applies with equal force in the hiring context, the Sixth Circuit held that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. Emphasizing that the hiring decision turned on a variety of factors, the Court distinguished the authorities upon which plaintiff Moore relies (*id.* at 237):

> "There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Wieman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes—finding good employees, maintaining and extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government."

Here, as in *Avery*, plaintiff Moore has alleged that decisions to hire state employees are based, in part, on a nonexclusive network of recommendations from a variety of sources. (R.A. 7, ¶ 11f.) Indeed, the allegations in this case portray an employment system far less restrictive than the system upheld by the Sixth Circuit in *Avery*.

In apparent recognition that there is no basis to extend the limited holding of *Elrod* to the dramatically different hiring practices alleged here, plaintiff Moore grossly mischaracterizes the nature of the alleged "patronage system." In the brief on the merits, plaintiff Moore claims that the State Officials have constructed an employment system in which "no Democrats or Independents or Republicans with political views differing from the incumbent administration shall be employed" by the State. (Pl. Br. 16.) That is not alleged anywhere in the complaint, nor could it be alleged consistent with Federal Rule of Civil Procedure 11. To the contrary, under the allegations of paragraph 11f of the complaint (R.A. 7), the challenged hiring system permits the hiring of, among others: (1) a Democratic friend of a member of the Illinois legislature who is a friend of Governor Thompson, (2) an

Independent friend or relative of a Republican, or (3) an apolitical friend of the Governor.

Elsewhere in the brief, plaintiff Moore argues that in order to get a job, he must vote in the Republican Party primary, work for the election of Republican candidates and contribute money to the Republican Party. (Pl. Br. 21.) This also is not alleged anywhere in the complaint. Plaintiff Moore also asserts in his brief that the State Officials "have used the employment system to coerce the merger of partisan loyalty with loyalty to the state. In essence, the [State Officials] require a loyalty oath in order to be . . . hired." (Pl. Br. 35.) This is rhetoric made from whole cloth; it is, as shown above, inconsistent with the allegations of the complaint.

By recasting the allegations of the complaint in this manner, plaintiff Moore apparently hopes to avail himself of this Court's decisions in *Branti*, *Elrod*, and *Keyishian*.[10] A careful examination of the complaint confirms that *Elrod* and the "loyalty oath" cases have no application here. As both courts below properly determined, there is a substantial difference between a strict employment system that excludes applicants on the basis of their beliefs, and plaintiff Moore's complaint that other qualified candidates were hired for the position he desired based, in part, on a panoply of considerations which are not limited to political belief. Pet. App. A-23 n.4; Pet. App. C-13. The kind of hiring system

[10] Plaintiff Moore is joined in the rewriting of the complaint by three of his amici, who take similar liberties in mischaracterizing the allegations in the complaint. *See, e.g.*, NEA Br. 4 (omitting any mention of the non-partisan components of the considerations allegedly used in the employment process); IVI Br. 3 (falsely asserting that non-Republicans are "excluded" from being hired "if they do not have the partisan support of the Republican Party officials"); NCF Br. 2 (erroneously stating that "[t]he pervasive patronage scheme in issue here employs the most strict political test as the threshold standard for the entire spectrum of employment decisions").

alleged here does not offend the letter or logic of this Court's ruling in *Elrod*.

B. The Burdens Imposed On The First Amendment Rights Of Applicants Who Fail To Obtain A Job Are Not Sufficient To State A Constitutional Claim.

The hiring practices alleged in the complaint are not only less partisan than the firings prohibited in *Elrod*, they also do not impose comparable burdens on the constitutional rights of affected applicants like Moore. In an opinion written by Justice Brennan, the three-Justice plurality in *Elrod* found that patronage practice runs afoul of the Constitution "to the extent it compels or restrains belief and association." 427 U.S. at 357. The plurality reasoned that dismissal or the threat of dismissal from existing employment "unquestionably inhibits protected belief and association" and "penalizes its exercise," and thus raises a constitutional issue. *Id.* at 359.

Because patronage dismissals "severely restrict political belief and association" (*id.* at 372), and represent a "severe encroachment on First Amendment freedoms" (*id.* at 373), the *Elrod* plurality considered whether there was adequate justification for this "unquestionable" effect. The plurality found that the interests proffered failed to justify the wholesale firings at issue in that case, and that patronage dismissals were not "the least restrictive alternative" to promote the democratic process. *Id.* at 369. Thus, the plurality concluded that the practice of wholesale firings based solely on partisan political reasons was prohibited by the First and Fourteenth Amendments. *Id.* at 373.

However, the *Elrod* plurality also recognized that a ban on all partisan political firings would undercut representative government by obstructing a new administration's implementation of its own policies. *Id.* at 367. For this reason, the plurality declined to go so far as to ban all such firings, and instead concluded that "[l]imiting patronage dismissals to

policymaking positions is sufficient to achieve this governmental end." *Id.*

The analysis employed by the plurality in *Elrod*—which focused on the burdens imposed on the constitutional rights of the affected employees—requires a different result in the hiring context at issue here. In this case, both the District Court and the Court of Appeals determined that any "chilling effect" on disappointed applicants who fail to get a particular job does not give rise to a constitutional claim. Pet. App. A-24; Pet. App. C-5. This determination correctly interprets the *Elrod* principle, and is consistent with more recent decisions of this Court examining the effects that various employment practices have on applicants and employees.[11]

[11] Two of plaintiffs' amici appear to concede that under *Elrod*, this Court must determine, as a threshold matter, whether the hiring practices alleged "significantly impair" First Amendment freedoms so as to require constitutional scrutiny. *See* IVI Br. 12 n.4 ("For constitutional purposes, the emphasis must be on the effect of the system on freedom of speech and association"); AFL Br. 11 (contending that First Amendment freedoms are "severely burdened" by the employment practices alleged). Relying on *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), plaintiffs and amicus NEA disagree with that approach; they contend that the extent of the burdens imposed on the First Amendment rights of the affected applicants and employees are irrelevant. *See Pl. Br.* 22-23; *see also* NEA Br. 3 (in balancing the interests of the employee and the state, as an employer, "the relative severity of the employment sanction that has been imposed . . . is not a factor to be weighed").

However, political patronage runs afoul of the Constitution "to the extent it compels or restrains belief and association." *Elrod*, 427 U.S. at 357 (plurality opinion). For this reason, plaintiffs and NEA err by leaping to a discussion of the relevant state interests without determining, at the outset, whether the burdens imposed on First Amendment freedoms are of constitutional magnitude. Their attempt to import the *Connick and Pickering* balancing tests should be rejected. The Court in *Connick* emphasized that in each of the precedents in which *Pickering* is rooted, the government employed the threat of discharge to prevent or "chill" public employees from joining political parties or other associations.

(footnote continued on following page)

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court struck down a school board's policy of affording minority teachers preferential protection from layoffs. Justice Powell's plurality opinion drew a sharp distinction between the effects which affirmative action plans have on incumbent employees and on individuals who seek to be hired. *Id.* at 282. The plurality observed that *"[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."* *Id.* at 282-83 (emphasis added). The plurality explained that "[a] worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations in a way that general hiring goals do

[11] *continued*

Connick, 461 U.S. at 144-45. In *Pickering* itself, as in *Connick* and more recently in *Rankin v. McPherson*, 483 U.S. 378, 379-80 (1987), this Court reviewed the *discharge* of a public employee in retaliation for the exercise of speech. *Pickering*, 391 U.S. at 574; *Connick*, 461 U.S. at 141. Thus, the effect on First Amendment rights underlying *Elrod* was present in each of those cases.

By contrast, in this case, there is no allegation that an employee has been discharged, threatened with discharge, or punished in retaliation for the exercise of protected speech or association. Plaintiffs here complain that other employees received more favorable treatment from their public employer on the basis of friendship, politics and the like. Neither *Connick* nor *Rankin* supports a departure from the *Elrod* analysis, which requires examination of the competing interests of the government and employee if there is found to be a significant effect on the First Amendment rights of the individual employee. *See Agosto De Feliciano v. Aponte Roque*, No. 86-1300, Slip. Op. at 13 (1st Cir. December 8, 1989)(*en banc*). *See also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 235 (1986) (Scalia, J., dissenting) (citation omitted) (" '[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights'; one must 'look closely at the nature of the intrusion . . . to see whether we are presented with a real limitation on First Amendment freedoms.' ")

not." *Id.* at 283.[12] *See also Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 638 (1987) ("denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioners"); *United States v. Paradise*, 480 U.S. 149, 183 (1987) (citation omitted) (" 'Denial of a future employment opportunity is not as intrusive as loss of an existing job,' and plainly postponement imposes a lesser burden still.")

Although *Wygant* involved a challenge under the Equal Protection Clause of the Fourteenth Amendment, the Court's observations as to the burdens imposed on the constitutional rights of the affected teachers are directly relevant to the issue here. *Wygant* reflects the Court's common sense determination that employment practices short of dismissal (or layoff) do not have the severe practical consequences that are attendant to the loss of a job. This determination is entirely consistent with the principle underlying *Elrod*, in which the Court reviewed the challenged firing practice in light of the burdens it imposed on the constitutional rights of the affected employees. This also is the analysis applied by the Seventh Circuit in this case, which held that plaintiff Moore's failure

[12] In a concurring opinion, Justice White suggested agreement with this distinction (id. at 295) (White, J., concurring): "Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks . . . is quite a different matter"). In a dissent joined by Justices Brennan and Blackmun, Justice Marshall similarly characterized the school board's hiring policies as "less severe" than the use of layoffs to increase minority employment. *Id.* at 309. Justice O'Connor expressed no view on the matter. Only Justice Stevens, in his dissenting opinion (*id.* at 319 n.14), rejected this distinction.

to obtain a job was not actionable under the First Amendment.[13]

As this Court has recognized in *Wygant* and other cases, the Seventh Circuit observed that the burden imposed by a failure to obtain a particular position "is much less significant than losing a job." Pet. App. A-18. The Seventh Circuit explained (*id.* at A-19):

> "[A]n applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment at one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income."

Finding that use of the considerations alleged in this case fails to have the same effect as did the solely partisan dismissals of existing employees in *Elrod*, the Seventh Circuit

[13] In his brief, plaintiff Moore suggests that as a result of his failure to obtain a state job, he might have to contribute money to or volunteer to work for the Republican Party in alleged derogation of his ideals. (*See* Pl. Br. 31-32.) We previously demonstrated that in contrast to the arguments presented in the brief, the complaint does not allege that such partisan support is required to obtain a job with the state. (*See* pages 9-10, 19-20, *supra*.) Likewise, the complaint does not allege *any* effect on Moore's political views or activities, much less the effect that is suggested in the brief. More importantly, in fashioning a categorical rule of constitutional law, this Court in *Elrod* did not carve out an exception for the hearty employee who would not be deterred from political expression by the threatened loss of a job. So too in this context, the Court should not base its ruling on the hypothetical effects on a hypothetical plaintiff who might abandon his political beliefs if he does not obtain a job with the state.

correctly affirmed the dismissal of the hiring claim without proceeding to the next stage of the constitutional analysis.[14]

The Seventh Circuit's holding that elected officials may consider political factors in hiring public employees also is consistent with *Messer v. Curci*, 610 F. Supp. 179 (E.D. Ky. 1985), *aff'd*, 881 F.2d 219 (6th Cir. 1989) (en banc), *cert. pending*, No. 89-5849, and *Avery v. Jennings*, 786 F.2d 233, the only other appellate decisions on this issue.

In *Messer*, two seasonal workers challenged the decision of the Kentucky Department of Parks not to rehire them as seasonal workers. 610 F. Supp. at 180. The plaintiffs claimed that the defendants refused to hire them solely because of their political beliefs and their failure to work for the election of the then-Governor of the State of Kentucky. *Id.* at 181. The District Court, treating the employment decision as a failure to hire, found that *Elrod* and its progeny failed to support the plaintiffs' claims, and dismissed the complaint. *Id.* at 183-84.

On appeal, the Sixth Circuit affirmed dismissal of the complaint, holding that it is not constitutionally impermissi-

[14] The Seventh Circuit's decision on political hiring is consistent with and derives from its prior opinion in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). In *LaFalce*, the Seventh Circuit affirmed the District Court's dismissal of a complaint in which a contractor alleged he had been improperly denied a public contract based upon political considerations. The *LaFalce* Court reasoned that *Elrod's* prohibition of political firings is based on the principle "that public employees would be discouraged from expressing their true political views if it might cost them their jobs." *Id.* at 293. In rejecting the plaintiff's claim that unsuccessful contractors would similarly be discouraged, the Court of Appeals found the "extent of the likely interference" with First Amendment rights insufficient to raise constitutional concerns, and the wisdom of a constitutional ruling forbidding the use of political considerations in this context dubious at best. *Id.* at 294. *Accord Horn v. Kean*, 593 F. Supp. 1298 (D.N.J. 1984), *aff'd*, 796 F.2d 668 (3d Cir. 1986) (en banc).

ble "for an elected official to implement a preference for political supporters in government employment where not otherwise controlled by statute." 881 F.2d at 223. The Court in *Messer* emphasized that "[t]here are a number of distinctions, of considerable practical importance, between the first amendment costs of patronage firing of existing workers, and patronage hiring." *Id.* at 222. Among the controlling differences cited by the Court were the minimal burdens that a hiring system imposes on the constitutional rights of the affected applicants.

The Sixth Circuit further explained (*id.* at 223, citation omitted):

> "As noted in *Wygant*, the pain to the individual from a certainty of loss of existing employment is much greater than the loss of some possibility of employment in one of a number of possible employment opportunities. On the other hand, the potential advantage to an effective and vigorous government of choosing sympathetic and enthusiastic employees is much greater than the gain from dismissal of existing employees who are, by explicit hypothesis, performing satisfactorily. . . ."[15]

The Sixth Circuit's *en banc* decision in *Messer* builds upon its earlier decision in *Avery v. Jennings*, *supra*. In

[15] In upholding the hiring practice at issue in that case, the Sixth Circuit in *Messer* went farther than this Court needs to travel in this case. Plaintiff Moore has not alleged that applicants are denied employment with the State of Illinois solely because of their political affiliation. Instead, as we demonstrated in Part I A, *supra*, plaintiff Moore alleges only that the State Officials' hiring practices are "substantially motivated" by a myriad of "political considerations" that are not limited to political affiliation or partisan political matters. Under these circumstances, there is no basis for a constitutional claim. As the First Circuit observed in *Estrada-Adorno v. Gonzalez*, 861 F.2d 304, 305 (1st Cir. 1988) (emphasis in original): "[W]e have found no federal case holding that it violates the federal Constitution to use political criteria for *hiring* state employees, even in circumstances where it might violate the federal [C]onstitution to *dismiss* them for political reasons."

Avery, the Sixth Circuit held that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. Rejecting the plaintiff's claim that *Elrod's* prohibition of political dismissals applies with equal force in the hiring context, the Court of Appeals reasoned that "[a]lthough the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation." *Id.* at 236.[16]

[16] In contrast to *Messer* and *Avery*, the cases upon which plaintiff Moore relies did not involve, much less resolve, the hiring claim alleged in this complaint. In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff claimed that his existing employment status with the Library of Congress was affected adversely by an FBI investigation "based solely on the exercise of his associational rights resulting in concrete harms to his reputation and employment opportunities." *Id.* at 93.

In *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977), plaintiffs alleged that they were compelled to contribute part of their salaries to the county committee of the Republican Party to obtain a promotion. *Id.* at 550. In contrast to *Cullen*, it was not (and could not have been) alleged in this case that plaintiffs were forced to make financial contributions to the Republican Party. Indeed, while plaintiffs attach to their complaint a questionnaire allegedly used in promotions—not hiring—that seeks information about the willingness of qualified applicants for promotion to contribute time or money to support the Republican Party, it is not alleged that applicants must fill out the questionnaire, perform work, or contribute money to the Republican Party in order to be promoted. (*See* Pet. App. C-2.)

The Third Circuit has acknowledged that its suggestion in *Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977), that a state may not condition hiring on political factors, was "pure dicta" and not controlling. *Mazus v. Department of Transportation*, 629 F.2d 870, 873 (3d Cir. 1980). The only other case cited, *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983), involved the right to privacy and "appellant's interest in family living arrangements, procreation and marriage." It is simply irrelevant to the issues raised in this case.

In *Elrod*, this Court imposed the first constitutional limit on the historic practice of political patronage. Finding that the partisan dismissal of public employees inhibits First Amendment rights and penalizes their exercise, the Court curtailed—but did not entirely forbid—the practice. *Elrod*, 427 U.S. at 375 (concurring opinion). In subsequent decisions, the Court has recognized that dismissals from employment have a far greater impact on individuals than do other types of employment practices, for example, hiring, in which no vested interests or settled expectations exist.

Based on this analysis, the only courts of appeals to have addressed this issue, including the Seventh Circuit in this case, have found that the difference between losing an existing job and failing to obtain one is substantial, and dispositive for constitutional purposes. Neither *Elrod* nor its progeny justify extension of the ban on patronage firing to the very different hiring practices alleged in the complaint. Because the burdens imposed on the constitutional rights of plaintiff Moore are not comparable to the loss of a job, and because the "political considerations" alleged here differ markedly from the solely partisan firing practice proscribed in *Elrod*, the Seventh Circuit correctly upheld the dismissal of plaintiff Moore's claim.[17]

[17] This Court's decision in *Perry v. Sindermann*, 408 U.S. 593 (1972), is clearly distinguishable on both of these grounds. In *Perry*, the plaintiff alleged that the college's decision not to retain him (after ten years of employment) was based on his public criticism of the college administration. *Id.* at 595. The Court's analysis was premised on the plaintiff's allegations that the college had a *de facto* tenure program and that he had tenure under that program. *Id.* at 600-01. Thus, the actual holding of the Court (*id.* at 596)—that the plaintiff's lack of a contractual right to reemployment did not, standing alone, defeat his First Amendment claim—is not inconsistent with the Court of Appeals' decision affirming dismissal of the hiring claim here. Even if *Perry* is not considered a strict firing case, which we believe it is, the college's decision clearly disrupted the plaintiff's settled expectations that he would continue in his job. Moreover, the language in *Perry*

(footnote continued on following page)

II.

CONSIDERATION OF FRIENDSHIPS AND POLITICS IN GRANTING FAVORABLE TREATMENT TO QUALIFIED PUBLIC EMPLOYEES DOES NOT STATE A FIRST AMENDMENT CLAIM.

Plaintiffs Rutan, Taylor, Standefer and O'Brien, who admittedly have not been punished in any way because of their political beliefs or activities, nonetheless attempt to state a constitutional claim because they allegedly failed to obtain a promotion, transfer, or rehire as a result of the considerations of friendship and politics described in the complaint. In this case, the Seventh Circuit extended *Elrod* to protect employees from patronage practices short of dismissal "that may, as a practical matter, impose the same burden as outright termination." Pet. App. A-17. The Court of Appeals remanded the employees' claims for a determination whether the particular employment actions complained of were "the substantial equivalent of a dismissal." *Id.* at A-25.

We previously have demonstrated that there is a substantial and constitutionally significant difference between burdens imposed on individuals who are dismissed from existing employment and on applicants who fail to obtain a job. *See* pages 21-29, *supra*. We also have demonstrated that the complaint alleges an employment system that is far less restrictive than the strict partisan system of wholesale firings

[17] *continued*
upon which plaintiffs principally rely (*id.* at 597), and the cases cited therein, merely reflect the long-established principle that the state may not punish employees solely for the exercise of protected speech. The decision not to retain Mr. Perry was direct punishment for his exercise of speech and thus ran afoul of this principle.

Plaintiff Moore does not and cannot make either allegation critical to *Perry*: he does not claim that he was punished—in any way, directly or indirectly—for exercising his First Amendment rights; nor does he allege that his failure to obtain a job disrupted any settled expectations and thus burdened his First Amendment rights.

prohibited in *Elrod*. See pages 9-10, 19-20, *supra*. In Section A, below, we demonstrate that these factors also require dismissal of the claims of the employees. Plaintiffs Rutan, Taylor, Standefer and O'Brien have not been adversely affected in their employment status by the use of the considerations alleged in the complaint.

In Section B, we demonstrate that the employees' claims in this case properly cannot be equated with cases involving the imposition of punitive employment sanctions in retaliation for the exercise of protected speech. The chilling effect underlying *Elrod* simply does not exist in the absence of punitive sanctions, or some other employment practice which adversely affects the terms and conditions of an employee's job. Thus, the Seventh Circuit correctly observed that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." Pet. App. A-23 n.4. The Court of Appeals erred, however, in failing to give full effect to its observation. The allegations of the employees do not give rise to a constitutional claim, and were correctly dismissed by the District Court.

A. The Alleged Denials Of Promotion, Transfer And Rehire Do Not Affect First Amendment Rights Sufficiently To Raise A Constitutional Issue.

This Court's ruling in *Elrod* was premised on the finding that political firings represent a "severe encroachment on First Amendment freedoms." *Elrod*, 427 U.S. at 373 (plurality opinion). Because the severe employment sanctions proscribed in that case inhibited protected belief and association and penalized their exercise, the plurality found a constitutional issue requiring a balance of the competing state interests. *Id.* at 362.

The allegations of the employees in this case are vastly different from the claims presented in *Elrod*. There is no allegation here that any state employee has been discharged,

or threatened with discharge, with the concomitant disruption of settled expectations. There is no allegation that the State Officials employ a strict political test as the sole basis for employment decisions. Rather, the employees here allege that a "substantial" factor in such decisions are an array of considerations which include recommendations from family or friends of Republicans. (R.A. 7, ¶ 11f.) Likewise, there is no allegation here that the employees have been punished for their political beliefs. Rather, it is alleged only that they "did not receive some favorable employment decisions" as an indirect effect of the considerations of friendship, politics and other relationships. Pet. App. A-8, 23 n.4; Pet. App. C-11, 13. The District Court correctly recognized that these distinctions were critical under the *Elrod* analysis, and required the dismissal of all of the employees' claims. Pet. App. C-5.

The Seventh Circuit recognized that promotion, transfer and rehire decisions are "significantly less coercive and disruptive than discharges." Pet. App. A-19. Nonetheless, the Seventh Circuit remanded the employees' claims on the rationale that those claims could raise a constitutional issue if it were demonstrated that the effect of the denial of promotion, transfer or rehire was to "impose the same burden as outright termination." Pet. App. A-17.

A remand for this determination is unnecessary. Plaintiffs Rutan and Taylor do not claim that their failure to be promoted or transferred resulted in the loss of their jobs, or in any way adversely affected the terms of their employment. Nor do Rutan and Taylor claim that they permanently are barred from receiving the promotions or transfers which they sought. Instead, they challenge the decision of the State Officials to promote another qualified employee or to deny a desired transfer, allegedly based, in part, on considerations of politics and/or friendship.

As a matter of law, this failure to obtain a desired promotion or transfer does not disrupt settled expectations

in a manner comparable to a discharge decision. In *Wygant v. Jackson Board of Education*, 476 U.S. at 282-83, this Court recognized that denial of a future employment opportunity is not as intrusive as the loss of a job. In subsequent decisions, the Court has confirmed that the burdens imposed on the rights of existing employees under circumstances similar to those here do not have the same profound effect as a termination of employment.

In *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), a qualified male employee filed suit challenging the defendant's decision, taken pursuant to an affirmative action plan, to promote a qualified woman to the position of road dispatcher, based, in part, on her sex. *Id.* at 619. Upholding the validity of the affirmative action plan, the Court found that the challenged practice did not unduly affect the terms and conditions of the plaintiff's employment. The Court explained (*id.* at 638):

> "[P]etitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."

The same can be said of plaintiffs Rutan and Taylor. Plaintiffs Rutan and Taylor had no "firmly rooted" expectation or "absolute entitlement" to the promotions they desired. They continue to work for the State of Illinois "at the same salary and with the same seniority, and remain[ ] eligible for other promotions." *Id.* *Johnson* confirms that failing to receive a promotion does not carry the same practical consequences that are attendant upon a discharge. It also supports the conclusion that *Elrod*, which is premised on a severe encroachment on constitutional rights, does not apply to the

allegations raised here.[18] As a result, the Seventh Circuit should have affirmed the dismissal of the promotion and transfer claims.[19]

A remand also is unnecessary to determine that the rehiring allegations of plaintiffs Standefer and O'Brien do not state a constitutional claim. As the Seventh Circuit recognized, these claims are even "more straightforward" than the promotion and transfer claims. Pet. App. A-27. Plaintiffs Standefer and O'Brien do not allege that their layoffs were in any way motivated by political considerations. Nor do they claim that they had any specific right to recall or rehire.

Based on their own allegations, plaintiffs Standefer and O'Brien stood in the position of new applicants for employment, with no pre-existing right to obtain a job. *See Rice v.*

[18] In *United States v. Paradise*, 480 U.S. 149 (1987), a four-Justice plurality applied the same analysis to uphold a District Court's order that at least 50% of the Alabama state troopers promoted to corporal must be black. In an opinion written by Justice Brennan, the plurality observed (480 U.S. at 182-83, citations omitted): "The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*. . . . Consequently, like a hiring goal, it 'impose[s] a diffuse burden, . . . foreclosing only one of several opportunities.' 'Denial of a future employment opportunity is not as intrusive as loss of an existing job,' and plainly postponement imposes a lesser burden still."

[19] The Sixth Circuit recently reached this result in *Rice v. Ohio Department of Transportation*, 887 F.2d 716 (6th Cir. 1989), *cert. pending*, No. 89-761. In *Rice*, the plaintiff alleged that the defendants' consideration of political factors in declining to promote him violated the First Amendment. *Id.* at 719. Upholding the District Court's dismissal of the claim, the Court of Appeals explained (*id.*): "We see no meaningful distinction, in the present context, between a failure to promote and a failure to hire or rehire. Assuming Mr. Rice's allegations of political motivation are correct, the defendants' decision not to promote Mr. Rice was the product of precisely the sort of 'preference for political supporters in government employment' that we found constitutionally permissible in *Messer*."

Ohio Department of Transportation, 887 F.2d at 719 (finding no difference, under the First Amendment, between a failure to hire and failure to rehire); *Messer v. Curci*, 881 F.2d at 221 (plaintiffs treated as applicants where they had no continuing employment status under state law and were not employed at the time of the contested decision). As with the hiring claim of plaintiff Moore, any conceivable burden on the First Amendment interests of plaintiffs Standefer and O'Brien as a result of their failure to obtain a position "is much less significant than losing a job." Pet. App. A-18.

Facing an issue far different from the one raised by the complaint in this case, the First Circuit recently held that punitive employment actions short of dismissal that are based solely on political affiliation may state a First Amendment claim only if, *inter alia*, a plaintiff establishes by clear and convincing evidence that "the employer's challenged actions result[ed] in a work situation 'unreasonably inferior' to the norm for the position." *Agosto De Feliciano v. Aponte Roque*, No. 86-1300, Slip Op. at 18 (1st Cir. December 8, 1989) (en banc). In fashioning this standard, the First Circuit embraced the analysis of the burdens on First Amendment rights required by *Elrod* and applied by the Courts below and by the Sixth Circuit in *Avery* and *Messer*. *See* Slip Op. at 13 (adopting a "categorical cutoff point of severity below which actions simply should not be considered a constitutionally significant burden"). The First Circuit reasoned that not every adverse employment action creates a First Amendment claim (*id.* at 15): "[I]nsubstantial changes in an employee's work conditions and responsibilities, even when politically motivated, either would not reasonably chill the employee's exercise of the right to free political association, or would cause a level of burden that is almost certainly outweighed by the government's need to protect its own interest in implementing new policies."

In this case, plaintiffs' "work conditions" have not changed at all. Quite the contrary, the fact that their work

conditions have not changed for the better is the sole basis for their complaint. Thus, while the test in *Agosto* is designed to govern a situation not presented here—the imposition of adverse employment actions based solely upon political affiliation—the First Circuit's recognition that not all such decisions rise to the level of a constitutional deprivation strongly supports dismissal of the employees' claims here.

B. The Employees Were Not Punished For The Exercise Of Protected Belief Or Association.

In contrast to *Elrod*, *Branti* and *Perry*, the principal cases upon which plaintiffs rely, this case does not involve allegations that public employees have been punished for the exercise of protected speech. Plaintiffs Rutan, Taylor, Standefer and O'Brien assert only that other qualified employees received jobs, promotions, or transfers which they themselves desired. (*E.g.* R.A. 19, ¶ 19g.) This distinction was critical to the Seventh Circuit, which emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." Pet. App. A-23 n.4.

The principal concern underlying *Elrod*—preventing elected officials from using discharge or the threat of discharge to chill the exercise of protected belief and association by public employees—is not implicated by the use of the kinds of considerations involved in this case. In contrast to the directly punitive nature of the discharges curtailed in *Elrod* (*i.e.*, employees were fired solely if they failed to join the Democratic Party), the employees in this case complain that other qualified candidates were favored because of political or personal connections.

There is no claim in this case that plaintiffs were reprimanded, harassed or punished for political belief. Nor is there any allegation that the state employees who were promoted or rehired failed to perform their responsibilities, or to render necessary service, to the state. There is a significant difference

between an employment system which uses a strict political test "designed to call attention to political differences and punish those who differ," and a system like that alleged here, which may favor certain employees by taking into account many factors, including recommendations from family, friends and political allies. Pet. App. A-23 n.4; *Avery*, 786 F.2d at 236.

The employees (and NEA) incorrectly rely on a line of decisions—including prior decisions of the Seventh Circuit—which involved the imposition of punitive employment sanctions in retaliation for the exercise of protected speech. Plaintiffs are wrong in asserting that the Seventh Circuit's decision in the case is "an aberration," and abandons that Court's "outstanding record in protecting public employees' First Amendment Rights." (Pl. Br. 22-23.) In each of the decisions upon which the employees rely (Pl. Br. 23), the plaintiffs suffered punitive employment actions in direct retaliation for protected expression.[20]

Here, in contrast, there is no allegation that the employees have been demoted, transferred, harassed, reprimanded or punished in any way for their political beliefs. The distinction drawn by the Seventh Circuit in this case is a

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[20] *E.g.*, *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir.), *cert denied*, 474 U.S. 803 (1985) (teacher given negative evaluations, removed as athletic coach and transferred as a result of speech on matter of public concern); *Egger v. Phillips*, 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983) (former FBI agent involuntarily transferred and ultimately discharged after he alleged that other bureau personnel had engaged in wrongful conduct); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (plaintiff subjected to a pattern of harassment and ridicule in retaliation for her campaign for public office); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (teacher involuntarily transferred in retaliation for expressing a complaint on school policy); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (police officer reprimanded for violating rule prohibiting employees from engaging in discussion "derogatory to the department").

meaningful one, as it demonstrated more recently in *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). In *Pieczynski*, the Court of Appeals upheld a jury verdict in favor of an employee who had been subjected to a pattern of harassment because of her political alliance with an opponent of the then-Mayor of Chicago. Harmonizing the precedents upon which plaintiffs rely, the Court reiterated a critical distinction underlying this case (875 F.2d at 1333-34): "It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees."

In light of this significant difference, *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), and numerous other decisions of the Courts of Appeals, do not control or even address the issue presented by this case. In *Bennis*, the plaintiffs alleged that they had been demoted in retaliation for their support of the Mayor's political opponent. The Third Circuit's opinion in *Bennis*, from which the employees quote at length (Pl. Br. 24), is on its face limited to the imposition of employment sanctions or "any *disciplinary action* for the exercise of permissible free speech." *Id.* at 731 (emphasis added). Here, it is not alleged and cannot seriously be contended that the employees have been disciplined, or that punitive sanctions have been imposed by their public employer.[21]

[21] This critical distinction renders inapposite the other decisions upon which the employees and NEA principally rely. In *Robb v. City of Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984), the plaintiff was transferred from his position as manager of an outdoor amphitheater to a job as a playground supervisor in retaliation for his union activities and refusal to settle a private lawsuit. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the sole issue before the court was whether a policeman may be demoted for "intemperately criticizing the police chief in front of another police officer while off duty." *Id.* at 834. In *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), the plaintiff contended that he had been reassigned and transferred for political reasons to a less desirable

(footnote continued on following page)

Each of these cases is distinguished by a central allegation conspicuously absent from the complaint here: the plaintiffs suffered some concrete measure of retaliation (which disrupted their "settled expectations") as a direct result of protected expression. In contrast, this case does not involve allegations of punishment or retribution for political beliefs, but rather, the disappointment of plaintiffs Rutan, Taylor, Standefer and O'Brien that other employees received promotions, transfers or positions which these plaintiffs desired. The employees' disappointment is not actionable under the First Amendment.[22]

[21] *continued*
position in another region of the country. In *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988), the plaintiff alleged that her demands for payment relating to compensatory time and vacation time were denied solely because of her political affiliation. *See also Agosto De Feliciano*, Slip. Op. at 5 (alleging a "drastic change and reduction of [plaintiffs'] duties").

[22] If this Court disagrees, and determines that any of the employees has stated a constitutional claim, we submit—in the alternative—that the Seventh Circuit properly placed the burden on the employee to prove that the failure to obtain a desired promotion, transfer or rehire imposed "the same burden as outright termination." Pet. App. A-17. This test, derived from the Fourth Circuit's decision in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), strikes an appropriate balance for three principal reasons. First, the *Delong* analysis properly accounts for this Court's limited holding in *Elrod* and recognizes that there is serious question as to the wisdom of further extending the reach of that decision. Pet. App. A-17. Second, substantial differences exist between dismissals, which can disrupt settled expectations, and the employment practices alleged in the complaint. *Id.* Third, *Delong* avoids the significant intrusion of federal courts that would result from extending *Elrod* beyond the "substantial equivalent of dismissal," while at the same time providing a remedy for an employee who can demonstrate that his or her failure to obtain a desired promotion, transfer or rehire imposes the same burden on First Amendment rights as would the employee's outright termination. *Id.* at A-17-18.

In contrast to *Delong*, the Third Circuit has extended *Elrod* to prohibit the "imposition of any disciplinary action for the exercise of permissible free speech." *Bennis v. Gable*, 823 F.2d at

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III.

STRONG PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST ATTEMPTING TO PURGE FRIENDSHIP AND POLITICS FROM THE PERSONNEL PRACTICES OF STATE AND LOCAL GOVERNMENTS.

At bottom, plaintiffs' claims in this case are reduced to the accusation that they, rather than some other Code-qualified candidates, should have been hired, promoted, transferred or rehired by the State of Illinois. Strong prudential considerations, as well as the foregoing constitutional principles, confirm that federal courts are not the proper forum to assert these claims.

This Court recognized in *Bishop v. Wood*, 426 U.S. 341, 349 (1976), that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *See also Connick v. Myers*, 461 U.S. at 143 (emphasizing the "common-sense realization that government offices could not function if every employment decision became a constitutional matter"). More recently, in *Rankin v. McPherson*, 483 U.S. 378 (1987), this Court recognized that "public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.* at 384 (emphasis in original).

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[11] *continued*

731. We previously demonstrated that the *Bennis* standard does not apply to the allegations stated here because no employees have been disciplined or punished for the exercise of free speech. (*See* pages 36-39, *supra*.) In any event, the Third Circuit's approach is flawed because it represents an unwarranted extension of *Elrod*. Under *Bennis*, it appears that any employee who perceives a slight on the job may state a constitutional claim, without any consideration of the burdens allegedly imposed on his or her constitutional rights.

While each of these admonitions arose in the context of a different constitutional claim, they are particularly apt in this case for two principal reasons: (1) the potential disruption with state and local government which would result from extending *Elrod* to the vastly different practices alleged here; and (2) the absence of any consensus (even among the courts) that friendship and politics should be purged from all contexts of public employment.

Interference with state and local governmental operations will be increased dramatically if *Elrod* is extended to cover all applicants for employment and all existing employees who fail to receive a desired promotion, transfer or rehire. There already are some 60,000 persons employed statewide in Illinois who would be implicated by a decision upholding the claims urged by plaintiffs here. There are thousands more who have applied and will apply for a job with the state. Unlike firing decisions, which are more limited in number, tens of thousands of decisions are made annually concerning hiring, promotion, transfer and rehire. Moreover, unlike the typical discharge situation, in which one employee has been fired, dozens of disappointed applicants might each file a federal suit alleging that they were not hired as a result of politics, friendship and family connections.

Plaintiffs nonetheless ask this Court to proceed down this path, apparently contending that everyday personnel decisions throughout the State of Illinois—and throughout every other state—properly should become a "constitutional matter" supervised by a federal judge. Plaintiffs' position is rigid and absolute: considerations of friendship and politics may *never* be taken into account in the vast majority of personnel decisions made daily by public offices nationwide.

The Seventh Circuit properly declined plaintiffs' invitation to "constitutionalize civil service and then preside over the system." Pet. App. A-22. Rejecting plaintiffs' demand that such considerations be purged from the employment process, the Court of Appeals explained (*id.*):

> "Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. Political issues and beliefs do not come in neat packages wrapped 'Democratic' and 'Republican.' A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether 'politics' could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals."[23]

The suggestion that federal courts can and should scrutinize the motives of elected state and local officials when they hire, promote and transfer public employees far exceeds this court's narrow ruling in *Elrod*. The principle that public officials cannot fire nonpolicymaking employees solely on the basis of their political affiliation does not support, much less mandate, replacing the Personnel Code adopted by the State of Illinois. The Illinois General Assembly has chosen not to prohibit public officials from preferring one qualified applicant over another on the basis of the considerations alleged in the complaint. To interpret *Elrod* to require such a system unwisely expands the reach of that decision beyond the limits of its history, *see* B. Cardozo, *The Nature of the Judicial Process*, 51 (1921), and imposes unrealistic burdens on federal

[23] *See also Agosto De Feliciano*, Slip Op. at 15 (recognizing substantial government interest, itself founded in the First Amendment, in implementing the policies of the new administration); *Avery*, 786 F.2d at 237 (extending *Elrod* "would require abolition of the hiring systems for office workers in thousands of legislative, executive, and judicial offices across the country . . . [and] the courts would have to constitutionalize a civil service system and oversee its operation"); *LaFalce*, 712 F.2d at 294 ("[A] decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit").

courts to supervise the personnel practices of state and local governments. As Judge Cudahy recognized in his concurring opinion in this case (Pet. App. A-32): "[R]emoving politics from the dispensation of government jobs is too daunting a task even for such all-purpose problem-solvers as the federal courts." *See also LaFalce v. Houston*, 712 F.2d at 294 ("To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, other as quixotic, still others as undemocratic, but all as formidable").

These observations have particular force in light of this Court's recognition in *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987), that choosing the "most qualified" employee is not an exact science, but a very human and therefore subjective endeavor (*id.* at 641 n.17, citation omitted):

> " '[I]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.' "

It is undoubtedly true that these prudential considerations, forceful as they are, must yield to constitutional principle in an appropriate case. Here, however, far from facing the moral imperative that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954), there is no consensus

that considerations of friendship and politics must be purged from all contexts of public employment.[24]

Thus, the attempt by plaintiffs and their amici to equate the considerations at issue here with discrimination on the basis of race (*see, e.g.*, Pl. Br. 37-39) and religious belief (NEA Br. at 7n.4)) ignores the substantial differences embedded in our history, culture and law between race or religious discrimination and the so-called "political discrimination."

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[24] Indeed, the unique and often salutary role of patronage in America politics has led some courts, while compelled to follow the ban on political dismissals, to urge the Court to reconsider *Elrod*. *See, e.g., Loughney v. Hickey*, 635 F.2d 1063, 1071 (3d Cir. 1980) (Aldisert, J., concurring) ("The first amendment is regarded properly as a shield protecting fundamental rights of individuals against government excess or tyranny of the majority. It is quite another thing to use it as a sword to cut out the heart of the basic processes that form our tradition of self-government. In my view, that is exactly what the Supreme Court has done here"); *Whited v. Fields*, 581 F. Supp. 1444, 1452 (W.D. Va. 1984) ("This court disagrees with the *Elrod-Branti* rule both from a standpoint of logic and justice.... We have become a government of the people by the people for the bureaucracy. The only result of the *Elrod* and *Branti* decisions is to simply freeze into public employment people whom the electorate have rejected"); *Visser v. Magnarelli*, 530 F. Supp. 1165, 1175 (N.D.N.Y. 1982) ("It is to be hoped that in light of the inadequate attention paid to patronage's benefits in the Supreme Court's balancing test ... the Supreme Court will reconsider the wisdom of its two decisions"). *See also Elrod*, 427 U.S. at 379 (Powell, J., dissenting) (*citing* C. Fish, *The Civil Service and the Patronage*, 156-57 (1905); Sorauf, *Patronage and Party*, 3 Midwest J. Pol. Sci. 115-16 (1959)); *Moeller, The Supreme Court's Quest for Fair Politics*, 1 Const. Comm. 203, 213-17 (1984).

The case before the Court raises only the question of whether the principle of *Elrod* requires a ban on considerations of friendship and politics as a factor in employment decisions other than discharge or discipline. Resolution of this question in favor of the defendants in this case does not involve reconsideration of *Elrod* itself.

The principle of religious freedom is deeply enshrined in our social and political culture, dating back to the arrival of the pilgrims at Plymouth Rock. This principle is embodied in the First Amendment. Our national commitment to racial nondiscrimination is, regrettably, of more recent vintage. It took a Civil War, more amendments to the Constitution, and an evolution of our society to arrive at our present commitment to racial freedom and equality. *See* Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv L. Rev. 1 (1987). *See also* Sullivan, *Book Review*, 32 Am. J. Leg. Hist. 179-82 (1988). But now, that commitment is of the same stature constitutionally as religious freedom.

The same simply does not hold true for "political" discrimination. The political leaders who viewed the First Amendment as a charter of religious liberty saw no tension between that Amendment and the use of politics and friendship in the dispensing of public jobs. The *Elrod* plurality noted that patronage has existed "at least since the Presidency of Thomas Jefferson," 427 U.S. at 353; Justice Powell's dissenting opinion traced the practice back to the administration of George Washington. *Id.* at 378 (Powell, J., dissenting). In that time, the exercise of politics and friendship was raw, and often ignored merit.

Over the years, governments at all levels have adopted merit principles which help ensure that government work is performed by qualified people. However, unlike discrimination based on religion or race, discrimination among qualified applicants on the basis of friendship or politics never has been—and is not now—inconsistent with constitutional doctrine or our conception of American government and society. In the absence of any consensus that the use of such considerations is intrinsically wrong, the Court should resist imposing upon state and local governments a constitutionalized civil service system.

CONCLUSION

For the foregoing reasons, the State Officials respectfully request that this Court affirm in part and reverse in part the decision of the Seventh Circuit, and reinstate the District Court's judgment dismissing the complaint in its entirety.

Respectfully submitted,

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Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents,

and

MARK FRECH, *et al.*,
Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' REPLY BRIEF ON THE MERITS

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PETITIONERS' AND CROSS-RESPONDENTS' REPLY BRIEF ON THE MERITS

INTRODUCTION TO ARGUMENT

Respondents' Brief is as significant for what it does not say as for what it does. Respondents do not, of course, dispute that the basis for the employment decisions in-

volved in this case, party affiliation, political support and voting history, lie at the heart of the First Amendment. Nor do they proffer any state interest to justify basing hiring and other job decisions on those factors. Certainly they do not argue that conditioning jobs on support of an officially favored political party is intended to right a prior constitutional wrong.

Respondents do, however, ignore the well-established precedent set by this Court that the state is prohibited from denying benefits on a basis that infringes constitutionally protected interests.

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Contrary to the allegations of the Complaint, Respondents seek to describe the case as if it did not deal with a structured system of hiring based on political affiliation, but on acquaintance and friendship.

Respondents also make the argument that hiring and other job decisions short of discharge are not important enough to warrant application of the First Amendment. Such an argument is plainly contrary to the long established precedent of this Court.

Respondents' suggestion in this regard is, however, far reaching and dangerous. It would allow public officials, even those administering a civil service system, to condition benefits of employment on support of an officially favored party or ideology.

The rule of law Respondents seek from this Court cannot be confined to political affiliation. It extends to belief on fundamental issues of public concern, for such is the

basis of political affiliation. The full implications were well stated by Judge Ripple:

> The majority's holding today will subject countless dedicated government workers, for whom party affiliation is not an "appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518, to harassment because they have chosen not to contribute to or work for a particular candidate or cause. For instance, the clerical worker who has strong views on the abortion issue and refuses to support a candidate of opposing views may be passed over for promotion, denied transfer to a more favorable location, or assigned the most undesirable tasks in the office. The worker who decides not to support a particular candidate because, in the worker's view, the candidate is not committed to racial equality can be treated in identical fashion. This growing acceptance of infringements on first amendment rights on the ground that the curtailment is minor is indeed a disturbing trend. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way. . . ." *Boyd v. United States*, 116 U.S. 616, 635 (1886). (Petition for Certiorari, pp. B-34-35).

ARGUMENT

I. The Complaint Alleges A Government Employment System By Which Important Benefits Of Employment Are Conditioned On Political Affiliation.

Respondents have sought to distort and trivialize the Complaint as if promotion, transfer, recall from lay-off and hire were not conditioned upon political affiliation. This is precisely the opposite of the allegations of the Complaint:

Introductory Statement

1. This is a class action by Plaintiffs against Defendants, who are officials and employees of the State of Illinois, and Defendants, who are persons acting in concert with Defendant officials and employees, asking this Court to declare illegal and unconstitutional Defendants maintaining and operating a political patronage system by which political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment and which system discriminates against those who are not such political and financial supporters in regard to State of Illinois employment. This action also asks that the Defendants be enjoined from operating and maintaining the political patronage system. (R.A. 2).

The employment system at issue in this case is a structured, formalized system whose "purpose and effect . . . is to limit state employment and the benefits of state employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits. . . ." (para. 11k of Complaint, R.A. 8).

The specific allegations as to Petitioners Rutan and Taylor clearly indicate their promotions were conditioned on politics.

> Plaintiffs, Cynthia Rutan and Franklin Taylor are employees of the State of Illinois . . . who . . . have been and are *denied promotion because they are not deemed politically acceptable or approved by defendants.* (para. 7a, Complaint, R.A. 4). (emphasis added).

Paragraphs 8a and 9a of the Complaint make the same allegations as to denial of Petitioner Taylor's transfer and the failure to recall Cross-Respondents Standefer and O'Brien from lay-off.

Petitioner, James W. Moore . . .

> is a member of and appropriate representative of a class of persons who have been and are desirable of becoming employees of the State of Illinois but *have been denied employment because . . . they are not deemed politically acceptable or approved by Defendants.* (para. 10a, Complaint, R.A. 5-6). (emphasis added).

The Complaint clearly meets the standard set forth in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), in that political considerations are a substantial or motivating factor in making the employment decisions in this case.

Paragraph 11f of the Complaint reads:

> 11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are *substantially motivated by political considerations. Such political considerations include whether the individual* under consideration is Republican or a relative or friend of a Republican, *is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican,* is a friend or supporter of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson. (R.A. 7). (emphasis added).

Respondents have quoted from this allegation to make it seem as if politics is just one factor along with other factors such as friendship. Plainly the use of the term friend in this context means supporter or contributor. But this Court need not address the meaning of friend, for a fair reading of the Complaint indicates politics is the substantial or motivating factor in granting these important benefits of employment.

These allegations are given additional coloration by the form used by the incumbent party (Exhibit B attached to the Complaint, R.A. 24), the letter from Representative Winchester (Exhibit C attached to the Complaint, R.A. 25-26) and the check of voting records. (para. 11g of Complaint, R.A. 7). It is clear that the very type of political coercion rejected in *Elrod v. Burns*, 427 U.S. 347 (1976), is present in this case as is the very type of sponsorship rejected in *Branti v. Finkel*, 445 U.S. 507 (1980). As was clear in *Branti*, the requirement of political sponsorship alone was sufficient to state a cause of action. Read as a whole under the rules of *Jenkins v. McKeithen*, 395 U.S. 411 (1969), the Complaint alleges that politics were decisive.

The claim is simple: the Petitioners and Cross-Respondents were disqualified from important benefits of employment on impermissible First Amendment grounds.

II. No Constitutional Distinction Can Be Made Between Politically Conditioned Firing And Other So Conditioned Employment Decisions.

Respondents argue that conditioning hiring and other benefits of employment on political affiliation does not significantly burden First Amendment rights, that any such burden is so minimal that such practices do not even require any state interest, let alone a compelling one. This argument is, however, directly contrary to long-standing precedent, which Respondents choose to ignore. It is contrary, as well, to basic common sense.

Respondents' position is that a person's interest in being hired for a state job or in receiving promotions, transfers and recall from lay-off is not important enough to justify application of the Constitution's protection of freedom of

speech or association. This exceptionally dangerous position has been repeatedly rejected by this Court.

In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), and *Weiman v. Updegraff*, 344 U.S. 183 (1952), this Court stated that no law can deny a government job based on the applicant's being a "Republican, Jew or Negro." In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court held that a state could not condition governmental hiring on an applicant's avoidance of certain views. And in *Torcaso v. Watkins*, 367 U.S. 488 (1961), which was not mentioned by Respondents, this Court held that public *appointment* could not be conditioned on grounds which violate the First Amendment. Even where persons have no "right" to public office, they do have the right:

> to be considered for public service without the burden of invidiously discriminatory disqualifications. The state may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970).

These decisions would have been impossible under Respondents' suggestion that hiring is too trivial a matter to warrant application of the First Amendment.

Respondents' argument would leave the state free to base hiring, promotion, transfer or recall from lay-off on an applicant's religion, race or sex. After all, an applicant for a state job who is rejected because he or she does not hold particular religious views similarly can always fall back on the rest of the job market. This only demonstrates the full implications of Respondents' position.

There is no analytical difference in the application of the First Amendment between hiring, promotion, transfer, recall from lay-off and discharge. Getting a good job, ad-

vancing within one's chosen profession or being recalled from lay-off in a timely fashion are significant to everyone. Conditioning any of these decisions on a person's voting record, party affiliation or political activities significantly burdens the rights of political speech and affiliation, which are at the heart of the Constitution.

Respondents' Brief also virtually ignores the long standing precedent expressed in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), which held that the state:

> may not *deny a benefit* to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. For if the government could *deny a benefit* to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would *in effect be penalized and inhibited.* This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. (emphasis added).

That holding followed a long line of prior decisions. It formed the basis for the majority holding in *Elrod v. Burns*, 427 U.S. 347 (1976), and was reaffirmed in *Branti v. Finkel*, 445 U.S. 507 (1980). In *Connick v. Myers*, 461 U.S. 138, 142-148 (1983), the principles set forth in those prior decisions were extensively discussed and reaffirmed.

Respondents only reference to *Perry v. Sindermann*, 408 U.S. 593 (1972), a footnote claiming the decision was based on settled expectations, is not only without basis in *Perry*, but was rejected *in haec verba* in *Branti v. Finkel*, 445 U.S. 507, 512, n.6 (1980).

> Petitioner argues that because respondents knew the system was a patronage system when they were hired, they did not have a reasonable expectation of being rehired when control of the office shifted to the Democratic Party. A similar waiver argument was rejected in *Elrod v. Burns*, 427 U.S. 347, 360, n.13; see also *id.* at 380 (Powell, J., dissenting). After *Elrod*, it is clear that *the lack of a reasonable expectation* of continued employment *is not sufficient* to justify a dismissal based solely on an employee's private political beliefs. (emphasis added).

Sindermann's expectations of continued employment (a Fourteenth Amendment claim) was *not* the basis for upholding his First Amendment claim.

Use of political affiliation as a criterion for making the state employment decisions in this case inevitably will have the effect of deterring, or "chilling," the exercise of First Amendment right of association. The very purpose of the system is to coerce affiliation, support and contributions.

The conditioning of benefits in this case can also be viewed from another perspective. No examination of an actual inhibiting effect is necessary when a challenged state action is based on its face on the content of political speech. When the Respondents acted against the Petitioners and Cross-Respondents, they favored certain political affiliations and beliefs and disfavored all others. This they may not do.

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

This holding and that of *Perry v. Sindermann*, 408 U.S. 593 (1972), have been amplified in those cases in which the denial of an important public benefit has been withheld due to the content of the speech or association. Quite

simply, " '[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.' " *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)) (invalidating a state law that provided a tax benefit only to magazines that published certain types of articles); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84 (1984) (overturning a Congressional act that denied federal grants only to those noncommercial broadcasters that engaged in editorializing). *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (time, place and manner restrictions must be justified without reference to the content of the regulated speech).

Such discrimination is equally forbidden when the distinction is made on the basis of political belief and association (or lack thereof), for "[t]he right to associate with the political party of one's choice is an integral part of th[e] basic constitutional freedom [of association]." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

The state cannot discriminate in public employment on the basis of any constitutionally impermissible criteria. That is true whether the benefit be promotion, transfer, recall from lay-off or hire. This is so regardless of the "chilling" effect of the state action, for the state must remain neutral in alloting benefits. The state must not discriminate on the basis of the exercise of the fundamental constitutional right of freedom of association.

Examination of the actual inhibiting effect of a state action is only necessary where a challenged state action is *neutral* on its face, applying equally to all persons. In these instances, the Court's inquiry becomes whether the neutral action nevertheless implicates First Amendment

concerns because of its actual inhibiting effect on the First Amendment activities of certain groups.[1]

This case involves no such neutral practice. The employees here were discriminated against in the matter of employment benefits because they did not have the proper affiliation with the Republican Party. That governmental discrimination violates the First Amendment wholly apart from whatever chilling effect it may have.

III. Respondents' Distinctions Are Without Merit.

A. Denial Of A Benefit Is No Less Unconstitutional Than Negative Action.

Respondents have tried to distinguish denial of a benefit due to exercise of First Amendment rights from "punishment" for exercise of those rights. Petitioners and

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[1] *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (examining whether neutral state election statute has inhibitory burden on associational rights of party); *Anderson v. Celebreeze*, 460 U.S. 780 (1983) (same); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (examining whether neutral state disclosure law will in fact subject minor party to inhibitory threats and harassment); *Buckley v. Valeo*, 424 U.S. 1, 69-74 (1976) (per curiam) (holding that factual showing of infringement on First Amendment associational rights must be shown by minor party in order to challenge neutral state disclosure law); *NAACP v. Button*, 371 U.S. 415, 432 (1963) (appraising neutral state attorney solicitation law to determine its "inhibitory effect upon [First Amendment] rights"); *NAACP v. Alabama ex rel. Patterson*, 356 U.S. 449, 460-63 (1958) (finding that neutral restraint upon the exercise by petitioner's members of their right of freedom of association). *See also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (weighing severity of impact of state compulsory education statute on the free exercise of religion of particular church); *Sherbert v. Verner*, 374 U.S. 398 (1963) (determining that state unemployment benefit law neutral on its face would have an impermissible inhibitory impact on free exercise rights of members of certain church).

Cross-Respondents certainly dispute that narrowing of the term punishment. Withholding a benefit can be every bit as coercive as negative action and may be far more effective in achieving behavior modification.

This Court has recognized Respondents' attempted distinction is without meaning. *Perry v. Sindermann*, 408 U.S. 593 (1972), its predecessors and progeny, dealt with denial of a benefit. In *Elrod v. Burns*, 427 U.S. 347, 359 n. 13 (1976), this Court said:

> Since the government however, may not seek to achieve an unlawful end either directly or indirectly, the inducement afforded by placing conditions on *a benefit* need not be particularly great in order to find that rights have been violated. *Rights are infringed both where the Government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.* (emphasis added).

Respondents also argue that the employment decisions were not made to punish but the effect on Petitioners and Cross-Respondents were incidental to benefitting others. This identical argument was, however, explicitly rejected by this Court in *Branti v. Finkel*, 445 U.S. 507 (1980). In *Branti*, the plaintiffs were discharged not to punish them for political views but to facilitate political hiring of their replacements. This was, however, held directly to infringe plaintiffs' own constitutional rights. There is no meaningful difference between not getting a job because one is not politically favored and not getting a job because one is politically disfavored. It is two ways of saying the same thing. See NEA Amicus Brief, pp. 6-7, n. 4.

B. The Holding Of This Court In *Wygant* Does Not Support Respondents' Position.

Respondents argue that hiring based upon political affiliation can be distinguished from political firing on the grounds it is "less intrusive." This is not a fair reading of *Wygant* in the context of this case.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court followed the same three stage jurisprudence analysis as traditionally used in First Amendment cases using the standard of exacting scrutiny. Recognizing that all persons have the right to be free from discrimination based on race, this Court held any racial classification must be justified by a compelling state interest. This Court went on to address *the third stage* in the First Amendment case analysis, namely, whether the means chosen to serve that state interest, if it did exist, were defined in the least restrictive terms possible.

At that third stage, this Court rejected the Board's racially preferential lay-off policy saying the state interest could be met through less restrictive means including racially preferential hiring goals. But this Court recognized that *both* lay-offs and hiring goals were intrusive. This Court would have allowed the lesser of two evils, hiring goals, *only* if second prong of the First Amendment analysis had been met—namely, that such intrusion was necessary to serve a compelling state interest.

The same analysis occurred in each of the cases following *Wygant*. The Court first examined whether the government interests were sufficiently compelling to justify preferential treatment of any kind and then carefully analyzed the "fit" of the preferential treatment plans to the particular interest to be furthered. *United States v. Paradise*, 480 U.S. 149, 166-85 (1987) (plurality opinion);

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 631-40 (1987).

Only in this *last* stage of the analysis did the issue of the degree of injury to the plaintiffs become relevant. And it arose *only* in the context of determining whether those injuries were necessary in order to further the *compelling state interest* of remedying discrimination, *i.e.*, whether the system was the least intrusive method of vindicating that interest.

The distinction between discharge and hiring was made in *Wygant* only to demonstrate that the lay-off plan was "not sufficiently tailored." *Id.* at 283. In *Paradise*, the plurality looked "to the impact of the [court-ordered] relief on the rights of third parties" *only* to determine whether the relief was "narrowly tailored" to the state's "compelling interest" in remedying racial discrimination. 480 U.S. at 171 (plurality opinion). The plurality concluded that the relief did not "*unnecessarily* trammel the rights" of innocent individuals. *Id.* at 183.

In *Johnson*, the Court also considered whether an affirmative action plan that was adopted for the legitimate purpose of remedying a manifest sexual imbalance in the workforce "*unnecessarily* trammeled the right of male employees." 480 U.S. at 637 (emphasis added). The Court's discussion of "unsettl[ing] . . . legitimate firmly rooted expectation[s]," then, arose only in assessing whether an affirmative action plan was closely tailored to meet a compelling governmental interest. The considerations of *Wygant* and its progeny are simply not present in this case.

Respondents have suggested, Resp. Br. at 23-24, 33-34 & n.18, that *Wygant* and the Court's subsequent cases discussed *supra* support their argument that injuries less severe than discharge "do not give rise to a constitutional

claim," *id.* at 12, because they do not "rise to the level of a constitutional deprivation," *id.* at 36. This reliance on the *Wygant* line of cases is misplaced.

If the logic of Respondents' reading of these cases were played out, the cases would stand for the proposition that any type of discrimination by a public employer in promotion, transfer, recall from lay-off and hire *never* "give[s] rise to a constitutional claim," because, as Respondents put it, any action short of discharge does not "rise to the level of a constitutional claim." These cases obviously do not stand for any such proposition.

Contrary to Respondents' argument, the discussion in *Wygant* and subsequent cases is *not* a discussion about constitutional rights. Rather, it is a discussion about what kinds of employment actions are *properly tailored to serve specific compelling state interests.*

The problem facing Respondents is that they did not suggest *any* state interest, let alone a compelling one, that justifies violation of Petitioners' and Cross-Respondents' First Amendment rights. Since the second stage of the First Amendment analysis was never reached, the third stage cannot be reached. As this case stands, the question of least intrusive remedy does not even arise, for Respondents have failed to even suggest a compelling state interest to support *any* of their challenged actions. This Court is not faced with the uncomfortable choice of the lesser of two evils in order to remedy a prior constitutional wrong.

Cross-Respondents O'Brien and Standefer submit that the *Wygant* opinion lays to rest the notion that failure to recall them from lay-off due to political reasons was "insignificant" and does not "rise" to a constitutional violation.

> Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. *Even a temporary lay-off may have adverse financial as well as psychological effects.* A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S.Ct. Rev. 1, 58, 106 S.Ct. at 1851. (emphasis added).

Applying *Wygant*, Petitioners and Cross-Respondents come full circle back to the traditional analysis of First Amendment cases. The patronage system is not being used to remedy a prior wrong. The Petitioners and Cross-Respondents are the innocent victims of adverse employment actions that serve no state interests but violate their First Amendment rights. Remedying this situation will simply allow the civil service system to proceed on merit principles without political considerations.

IV. The State Interests Alleged In The Amicus Commonwealth Of Puerto Rico's Brief Are Specious.

A. Stimulation Of Political Effort.

Amicus Commonwealth of Puerto Rico admits that the Illinois General Assembly could not pass a law permanently barring persons of a particular political affiliation from holding positions in government. But apparently Amicus Commonwealth of Puerto Rico believes the General Assembly could pass such a law for a period of four, eight or even twenty years—as long as the incumbent administration holds office.

Amicus Commonwealth of Puerto Rico's assertion that, somehow this situation will correct itself over time is simply not the purpose of the system in this case which is to perpetuate the incumbent party, to create "a significant political effort in favor of the "ins" . . . and against the "outs" i.e. those who may wish to challenge in elections." (para. 11k, Complaint, R.A. 8). This system does not promote political change.

Under the Amicus Commonwealth of Puerto Rico's theory, if a change in administration does occur, that administration will be free to exclude employees from promotion, transfer and recall from lay-off if they are not politically favored. That some other persons in the future may receive the benefits Petitioners and Cross-Respondents now seek is irrelevant. Their benefits are being denied now. Moreover, there is nothing in the record to indicate their denials would be remedied in the future.

Amicus Commonwealth of Puerto Rico's argument turns the Constitution on its head. The First Amendment was designed to protect the rights of the minority from the acts of the majority, not to reward that majority—nor to allow different groups to have their turn at violating constitutional rights.

Amicus Commonwealth of Puerto Rico's argument that the denial of a job is not so significant as to invoke any First Amendment protection is inconsistent with its other argument that political hiring stimulates political activity on behalf of the incumbent party. If, in fact, giving a job does stimulate political activity, that only demonstrates the impact so conditioning jobs has on First Amendment rights.

If stimulation of political effort is an overwhelming state interest, then the positions at issue should be *equally available* for all who are politically active, not just those active on

behalf of the favored party. There is no justification for conditioning jobs only on political effort for the incumbent party.

In *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court rejected stimulation of political activity on behalf of the incumbent party as being a compelling state interest.

B. The Ability Of An Administration To Carry Out Its Programs.

In both *Elrod v. Burns*, 347 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court recognized the need of an administration to implement its policy and programs. It can do so by firing and hiring policy makers for whom political considerations are appropriate; the other employees can be fired if they do not perform their duties. Neither Respondents nor Amicus Commonwealth of Puerto Rico have asserted that political affiliation is in any way relevant to the jobs in this case or relevant to carrying out any government policy. Indeed, they could not make such an assertion.

V. The Respondents' Position Invites Litigation.

Respondents caution against involving the federal courts in public employment decisions. This is not a state interest. Respondents suggest that a possible workload outweighs constitutional guarantees. The federal court system is, as it should be, now open to the First Amendment claims of public employees.

The federal court system has experienced its finest hours when it has protected the rights of citizens. That is what is at stake in this case.

> It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined. *Elrod v. Burns*, 427 U.S. 347, 353 (1976).

Petitioners submit the rule of law they seek will settle the law and lead to far less litigation than the approach of the Seventh Circuit Court of Appeals when it tried to reconcile its prior decisions upholding public employees' First Amendment rights with its decision in this case. *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). Harassment is actionable even though it does not amount to constructive discharge. Failure to promote is not actionable unless it amounts to constructive discharge. Involuntary transfer is actionable without amounting to constructive discharge. Refusal to grant a transfer is actionable only if it amounts to constructive discharge. And *ad infinitum*. While Petitioners contend these are distinctions without meaning, Petitioners further contend that such distinctions only invite litigation.

In contrast is the simple rule of law sought by Petitioners—that denial of the benefits of promotion, transfer, recall from lay-off and a job cannot be based on political affiliation. It is as simple as the rule of law set forth in *Perry v. Sindermann*, 408 U.S. 593 (1972), *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980).

It is a rule of law that can be easily understood by the employer. The clear rule of law set forth in *Elrod* and *Branti* has not led to a plethora of litigation regarding political discharge.[2] That law will be clear and make the job of the employer much easier than trying to second guess as to whether their conduct is actionable. If a few public officials choose not to obey this law, then the federal courts must, and should, be open to allow redress of violations of constitutional rights.

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[2] The assertion that upholding Petitioners' constitutional rights will flood the courts is contrary to the empirical evidence. Those circuits which have rejected the constructive discharge distinction have not experienced any significant volume of reported cases. Nor are state courts flooded with cases arising under state laws which prohibit political hiring or promotions.

CONCLUSION

Petitioners and Cross-Respondents have the right to hold particular political beliefs and to associate politically according to those beliefs without experiencing denial of important aspects of employment.

Petitioners and Cross-Respondents pray that this Court hold each Petitioner and Cross-Respondent has stated a cause of action and apply the rule of law set forth in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980), namely, that the Respondents cannot deprive Petitioners and Cross-Respondents promotion, transfer, recall from lay-off and employment itself on the basis of political belief and association.

Petitioners and Cross-Respondents pray this Court remand this case for full hearing on the Petitioners' and Cross-Respondents' claims.

Respectfully submitted,

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Nos. 88-1872 and 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
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v.
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Respondents.
and
MARK FRENCH, *et al.*,
Cross-Petitioners,
v.
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONERS/ CROSS-RESPONDENTS

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 90 national and international unions having a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* supporting petitioners/cross-respondents with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

As stated in *Branti* v. *Finkel*, 445 U.S. 507, 513 (1980), this Court held in *Elrod* v. *Burns*, 427 U.S. 347 (1976), "that the newly elected Democratic sheriff of Cook County, Ill., had violated the constitutional rights of certain non-civil-service employees by discharging them 'because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders.' 427 U.S., at 351." The common ground between the two separate opinions that supported *Elrod's* holding was their reliance on *Perry* v. *Sindermann*, 408 U.S. 593 (1972). In *Perry* this court established that even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech. *Id.* at 597-98, quoted in *Branti*, 445 U.S. at 514-15. The *Branti* court, following *Perry* and *Elrod*, ruled that two assistant public defenders could not be discharged by the recently appointed public defender, a Democrat, on the ground that they were Republicans. The court below held that *Elrod* and *Branti* are applicable only to discharges or to employment decisions which are the "substantial equivalent to a dismissal." 868 F.2d at 949-52, following *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir. 1980).

I.

The framework for analysis of public employees' First Amendment claims is stated in *Connick* v. *Myers*, 461 U.S. 138, 142 (1983), which followed *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968):

> Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

And, as just noted it is settled law that even though a person has no "right" to a valuable governmental benefit

and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *Perry*, 408 U.S. at 597.

Given this standard, it is clear that the plaintiffs and others in their position have a constitutionally-protected interest. It is difficult, if not impossible, to envisage a situation in which a promotion, a transfer—at least a transfer sought by the employee—or a rehire is *not* a "valuable governmental benefit." With respect to applicants for new employment, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), is directly in point, for it was there held that the First Amendment precludes the state from denying a commission as notary public to an individual on grounds which abridge his First Amendment rights. The right to vote and to associate with the political party of one's choice clearly "rank among our most precious freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 30, (1968). See also *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1987); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976); *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973).

As this case stands, there can be no doubt that both the freedom of political association and to vote according to one's choice are *severely burdened* by respondents' system. Employment benefits are made on the approval of the Governor's Office of Personnel, which makes use of the individual's (and his relatives') voting records and financial and other support of the Republican Party and its candidates, and the approval of state or county Republican Party officials. The party, in turn, determines the individual's and his family's voting history, past financial contribution and volunteer work for the Party and its candidates, and the future potential of such support. R.A. 7.

The right not to associate with and support a political party in these ways is clearly established. See *Tashjian*, 479 U.S. at 216, n.7; *Abood* v. *Board of Education*, 431 U.S. 209, 234-36 (1977). It bears emphasis, that Re-

spondents' political patronage system imposes an equally heavy burden on the *affirmative* right to engage in political activity in favor of the Democratic party and its candidates, or opponents of the ruling faction within the Republican Party. Any such activity would almost certainly disqualify the applicant in the minds of the Republican Party officials and the Governor's Office of Personnel.

II.

The court below opined that if the rights recognized in *Elrod* and *Branti* were recognized with respect to promotions, transfers and hires, "it would potentially subject public officials to lawsuits every time they make an employment decision." 868 F.2d at 954. The Court's concern is wholly unjustified because the complaint challenges a general *system* as applicable to all personnel decisions covering tens of thousands of state employees, rather than independent individual employment decisions. Moreover, the Court erred in relying on *Bishop* v. *Wood*, 426 U.S. 341 (1976) and *Connick* v. *Myers*, *supra*. *Bishop* did not involve a claimed violation of First Amendment rights. *Connick* strongly affirmed the rights of government employees not to be penalized for engaging in First Amendment activities on matters of public concern or for participating in political affairs.

The court below also relied on the governmental interest articulated by Justice Powell in his dissents in *Elrod* and *Branti*—that the support which a patronage system gives to political parties helps to maintain a stable political system. While "[m]aintaining a stable political system is, unquestionably, a compelling state interest," *Storer* v. *Brown*, 415 U.S. 724, 736 (1974), *Storer* itself shows by example that effectuating this interest does not automatically outweigh all First Amendment rights. See *id.* at 740; *Williams* v. *Rhodes*, 393 U.S. at 31-32; *Eu* v. *San Francisco Cty. Democratic Central Committee*, 109 S.Ct. 1013, 1022 (1989). Thus, if *Branti* leaves any room for considering that interest, then at the very least the

complaint must be reinstated and the case remanded for the thorough and painstaking inquiry which Judge Ripple outlined in dissent below. 848 F.2d at 1414-15.

But we submit that *Branti* does *not* leave open the possibility that there are classes of government positions as to which it is *improper* to take political party affiliation into account in making *discharge* decisions, but it is *proper* to take such affiliations into account in making hiring, transfer, and promotion decisions. The Court explained in *Branti*:

> The plurality [in *Elrod*] emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government. *The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.* [445 U.S. at 517, n.12 (emphasis added).]

In this analysis, the distinction the court below would draw between this case and *Branti* is simply irrelevant. Political patronage decisionmaking favors a "partisan interest" rather than a "governmental interest" whether that decision results in the discharge of an employee or the denial of a promotion or transfer or a failure to hire. Thus, where political party affiliation is *not* relevant to "maintaining governmental effectiveness and efficiency," 445 U.S. at 517, there is *no* legitimate overriding government interest that justifies patronage decisionmaking. On the contrary, allocating governmental resources *purely* in the interest of a partisan political party grants the favored party an advantage that threatens the legitimacy of our governmental structure.

ARGUMENT

1. Because the district court dismissed the complaint in this case, for present purposes the "facts" consist of the allegation of that complaint concerning the political patronage system in the State of Illinois challenged as violative of the First Amendment rights of government employees and applicants for government employment. We therefore begin by setting out the essential allegations concerning the operation of that system:

> 11e. The "Governor's Office of Personnel" controls all hiring, transfers, promotions and other significant aspects of employment by approving or disapproving such transactions on an individual basis using the Executive Order as its authority.
>
> 11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson.
>
> 11g. In giving or refusing approval of a particular individual for a particular employment position the "Governor's Office of Personnel" makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level.

> 11h. The Republican Party screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potention of such financial support, the potential of future "volunteer" work by the applicant in behalf of the Republican Party and its candidates. Attached hereto and incorporated herein as Exhibit B is the application form for promotion in State government employment used by the Republican Party in Sangamon County. [R.A. 7-8.] [1]

2. In *Connick* v. *Myers*, *supra*, 461 U.S. at 142, this Court set forth the framework for analysis of the First Amendment claims of public employees:[2]

> For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *Branti* v. *Finkel*, 445 U.S. 507, 515-516 (1980). Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.[3]

Accordingly, we first discuss the interests of the employees who are affected by the challenged patronage system

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[1] "R.A." refers to the Appendix to the State Respondents' Brief in Opposition. Exhibit B appears at R.A. 24.

[2] Except as the context indicates otherwise, the word "employee" will encompass applicants for employment throughout this brief.

[3] This case differs from *Pickering* and *Connick* in that efficiency of the public service is not one of the countervailing considerations relied on by the court below.

as alleged in the complaint herein, and then discuss the countervailing state interests which have been asserted in defense of this practice.

(a) *Elrod*, *supra*, and *Branti*, *supra*, struck down patronage practices which threatened (or effectuated) the discharge of public employees because of their political affiliations. The court below held that the principle of those decisions is to be limited to discharges or "practices that 'can be determined to be the substantial equivalent of dismissal.'" 868 F.2d at 949, quoting *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir. 1980).[4]

We submit that this blanket restriction on First Amendment claims, which automatically protects patronage practices which affect employment decisions such as the refusal to hire, promote or transfer is inconsistent with the theoretical underpinnings of *Elrod* and *Branti*. As noted in the Introduction, those decisions were predicated on the broad principle established in *Perry* v. *Sindermann*, *supra*, 408 U.S. at 597-98, where the Court reasoned:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the

[4] The court below stated that the

> Sixth Circuit implicitly recognized the distinction between patronage discharges and less burdensome patronage practices in *Avery* v. *Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986), which upheld patronage hiring practices against First Amendment attack. [868 F.2d at 962.]

The court below misunderstood *Avery*. The Sixth Circuit did not there approve the blanket use of political tests for hiring. Rather, that court concluded that there "is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, . . . and a patronage system that relies on family, friends and political allies for recommendations." 786 F.2d at 237.

> government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.
>
> We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall*, [357 U.S. 513, 526], unemployment benefits, *Sherbert* v. *Verner*, 374 U.S. 398, 404-405, and welfare payments, *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n.6; *Graham* v. *Richardson*, 403 U.S. 365, 374. But, most often, we have applied the principle to denials of public employment. [Citations omitted.] We have applied the principle regardless of the public employee's contractual or other claim to a job. [Citations omitted.]
>
> Thus, the respondent's lack of contractual or tenure "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim.

With respect to applicants for new employment, *Torcaso* v. *Watkins*, *supra*, 367 U.S. 488, is directly in point. There, it was held that the First Amendment precludes the state from denying a commission as notary public to an individual on grounds which abridge his First Amendment rights (in that case, freedom of religion): "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Id.* at 495-96.

The patronage practices at issue here (and the claims of the individual plaintiffs) also encompass promotions and transfers and rehires. Although no First Amendment case in this Court deals with precisely such employment decisions, the constitutional standard enunciated in *Perry* reaches "valuable governmental benefit[s]," 408 U.S. at 597, generally and is *not* limited to continued employment alone, *id.* The *Perry* Court's opinion—quoted

above—could not be clearer in that regard. It is difficult, if not impossible, to envisage a situation in which a promotion, a transfer—at least a transfer sought by the employee—or a rehire is *not* a valuable governmental benefit.

This is not to say that the precise nature of the benefit may not be pertinent to the balance which is to be struck down between the employees' interest and those of the government. Our point at this juncture of the argument is simply that the court below erred in holding that an employee (or applicant for employment) who challenges a patronage practice is cut off at the threshold unless he or she has been discharged actually or constructively.

It is incontrovertible, too, that the patronage system which is described in the complaint herein affects rights which "rank among our most precious freedoms." *Williams* v. *Rhodes*, *supra*, 393 U.S. at 30. As Justice Black, speaking for the court, reminded:

> [W]e have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." [339 U.S. at 30-31, footnote omitted.]

The First Amendment right to support political parties was recently reaffirmed in *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1987):

> The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod* v. *Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973). [479 U.S. at 214.]

As this case stands, there can be no doubt that the freedom of political association and to vote according to one's choice are *severely burdened* by this patronage system. Employment benefits are made to depend on the approval of the Governor's Office of Personnel, which "makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level." R.A. 7. The Republican Party, in turn, "screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potential of such financial support, the potential of future 'volunteer' work by the applicant in behalf of the Republican Party and its candidates." *Id.* See pp. 6-7, *supra*.

In *Tashjian*, the Court expressly recognized a First Amendment right not to register with a political party:

> [T]he requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the States requires regardless of the actual beliefs of the individual voter. Cf. *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 633-634 (1943). [479 U.S. at 216, n.7.]

So too, the right not to make a financial contribution to a political party is protected. *Abood* v. *Board of Education*, *supra*, 431 U.S. at 234-36. The Court there held that under the First Amendment, government employment may not be conditioned on payments to a labor organization to the extent that a portion of that organization's funds are used for partisan political expenditures. Given that decision, the right not to contribute to

an organization like the Republican Party which is devoted entirely to partisan political activities cannot be controverted.

Supporting a political party by providing personal time and effort to its causes, even more than registering as a party member or making a financial contribution, necessarily entails a public expression of agreement with the party which may be contrary to an individual's beliefs. Cf. *Tashjian*, *supra*. So too, it will often be highly offensive to a citizen to come before a political party official to whose views he is opposed, to satisfy whatever demands that official may make. Certainly this infringement on personal liberty is incomparably greater than the impersonal requirement of displaying the state motto on an automobile license plate, which was struck down in *Wooley* v. *Maynard*, 430 U.S. 705 (1977) or the financial contribution requirement which was disapproved in *Abood*, *supra*.

As a matter of settled law, then, the challenged patronage system clearly violates the petitioners' rights *not* to associate politically with the Republican Party. It is equally true, and it bears emphasis, that this political patronage system imposes an equally heavy burden on the *affirmative* right to engage in political activity in favor of the Democratic party and its candiates. See *Elrod*, 427 U.S. at 355-56 (plurality opinion). Even a Republican party official who would be willing to approve the hire or promotion of an individual who has not voted for or has not expressed his willingness to perform services for or contribute money to the Republican party would be exceedingly unlikely to approve an applicant who was active in the Democratic opposition to Republican party candidates. Indeed, given the partisan political character and purpose of the system, a Republican party official who gave his endorsement to a supporter of the Democratic party would be subject to serious criticism if not worse within his party constituency and would be unable

to justify his recommendation to the Governor's Office of Personnel which controls appointments. The same would likely be true with respect to employees who support primary candidates from a different faction of the Republican party for personal or ideological reasons, or otherwise oppose the incumbent Republican party officials.

(b) We turn next to the interests which, in the court of appeals' view, "strongly weigh against broadly expanding [beyond dismissal and constructive discharge] the rule *Branti* and *Elrod* enunciated." 868 F.2d at 953.

The first of those considerations is that "[r]ecognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision." 868 F.2d at 954. We submit that this consideration is invalid with respect to the complaint in this case because granting relief herein (and *a fortiori* reinstating the complaint) would not have the consequences which the court below anticipated, and because that court misunderstood the two decisions cited as supporting its conclusion.

The complaint challenges the legality of a general *system* as applicable to all personnel decisions covering tens of thousands of state employees (R.A. 6, ¶ 11a). The respondents have not contended (and indeed could not at this procedural stage) that the adverse personnel decisions affecting the petitioners were *not* made pursuant to that system. That challenge does not require judicial evaluation of the legality of individual personnel decision where the basis of the decision is in dispute, but only of a system which on its face makes political party affiliation an employment consideration. Thus even if the court of appeals' concern might be entitled to a particular individual personnel decision, that concern is simply inapposite here.

The court of appeals' concern is, in any event, invalid even in the context of individual personnel decisions. The

burden on public employers and on the litigation system which the court below feared is not different from that imposed by any of the well-recognized causes of action making it unlawful to refuse a valuable government benefit for invidious reasons. And the right at stake here is no less precious.

Indeed, *Pickering* v. *Board of Education*, *supra*, and *Perry*, *supra*, most assuredly hold that employees may challenge their discharges on the ground that the discharge is based on the exercise of their First Amendment rights. There is no evidence that the courts have been faced with any significant amount of litigation based on spurious claims of political motivation even with respect to discharges where, on the court below's own assumption, the harm to the employees is the most serious, and the incentive to conjure up claims would be the greatest. This experience serves to allay the lower court's "doubt" as to the ability of public employees in order to overturn entirely proper adverse personnel decisions.

In this connection, the court below wrote: "Political issues and beliefs do not come in neat packages wrapped 'Democratic' and 'Republican.' A wide variety of issues, interests, factions, parties, and personalities shape political debate." 868 F.2d at 564. With this we agree. But it simply does not follow that adverse personnel decisions motivated by disagreement with employees on these issues, etc., are not protected by the First Amendment. On the contrary, such cases as *Pickering*, and *Perry* show that while the First Amendment is particularly solicitous of participation in partisan politics its protections extend further. And the court below errs when it says "it is questionable whether 'politics' could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals." *Id.* Politics is "meaningfully separated" from the "other considerations" referred to by the First Amendment itself.

The court below also quoted and relied on *Bishop* v. *Wood*, *supra*, 426 U.S. at 349, where this Court said: "Federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." However, *Bishop* is clearly inapposite because the plaintiff employee in that case raised *no* First Amendment issue. Rather, the employee contended that his discharge deprived him of a liberty interest which was subject to due-process safeguards; one component of his claim was that the reasons given for his discharge were false. The sentence quoted by the court below was part of a discussion which rejected that argument.[5] *Bishop* thus applied the rule that a public employee must demonstrate the loss of a "liberty" or "property" interest in order to have a constitutional right to a hearing; that rule had been established in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and its companion case, *Perry*, 408 U.S. at 599. But, as we have seen, *Perry* also held that a public employee may challenge adverse employment decisions "because of his constitutionally protected speech or associations," regardless of the public employee's "contractual or other claim to a job." *Id.* at 597, quoted at p. 9, *supra*.

Whereas *Bishop* v. *Wood* is simply not in point, *Connick* v. *Myers*, *supra*, the other decision cited by the court below, is squarely inconsistent with that court's thesis that the complaint herein must be dismissed in order to avoid "an unprecedented intrusion into the political affairs of the states and other branches of federal govern-

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[5] See also the immediately preceding sentences:

> The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired. A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake. [426 U.S. at 349, footnote omitted.]

ment." 868 F.2d at 954. We begin by placing the phrase which the court below quotes from *Connick* into its context. The relevant portion of this Court's opinion in that case states:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the commonsense realization that government offices could not function if every employment decision became a constitutional matter. [461 U.S. at 143, footnote omitted.]

As this Court also wrote in *Connick*:

> *When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. [461 U.S. at 146, emphasis added.]

Association (or nonassociation) with a political party, which is at stake in this case, is incontrovertibly on the "citizen" side of the line which was articulated in *Connick* and its antecedents. Justice White explained for the *Connick* Court:

> In all of . . . the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" *by the fear of discharge from joining political parties* and other associations that certain public officials might find "subversive." The explanation for *the Constitution's special concern with threats to the right of citizens to participate in political* affairs is no mystery. . . . [T]he Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). [461 U.S. at 144-45, emphasis added.]

The entire Court agreed on this basic principle; see also 461 U.S. at 161-62 (dissenting opinion).

The other consideration which the court below believed outweighs the public employee's interest in being protected "against the more limited burdens imposed by patronage practices other than dismissing or constructively discharging an employee," 868 F.2d at 953, is that articulated by Justice Powell in his dissenting opinions in *Elrod* and *Branti*. The court below quoted approvingly the following passage from Justice Powell's *Branti* dissent:

> Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to over-arching issues of domestic and foreign policy." [*Branti*, 445 U.S. at 532 (Powell, J., dissenting).]

As the Court reiterated at the last Term, "[m]aintaining a stable political system is, unquestionably, a compelling state interest." *Eu* v. *San Francisco Cty. Democratic Central Committee*, 109 S.Ct. 1013, 1022 (1989), citing *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). In *Storer* the Court held that the prevention of "splintered parties and unrestrained factualism" justified provisions of California's Elections Code which denied ballot position to an independent candidates for elective public office who

had a registered affiliation with a qualified political party within one year prior to the immediately preceding prior election. *Id.*

But in *Storer* the Court also reinstated the claims of two other prospective candidates for office who challenged California's requirement that an independent candidate for President or Vice President must obtain signatures and a nominating petition for not less than 5% nor more than 6% of the entire vote cast in the preceding general election and to obtain such signatures in a specified 24-day period. The Court remanded those claims "to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President" by this requirement. *Id.* at 740. See also *Williams* v. *Rhodes*, 393 U.S. at 31-32, and *Anderson* v. *Celebrezze*, 460 U.S. 780, 801-802 (1983) (holding that the State's interest in political stability cannot justify protecting the Republican and Democratic parties from external competition by the virtual exclusion from the ballot of political candidates from other parties). So too, in *Eu* itself the Court held that the interest in political stability did not justify the challenged California statute which significantly burdened a political party's First Amendment rights because the State "never adequately explains how banning Parties from endorsing or opposing primary candidates advances that interest." 109 S.Ct. at 1022.

In short, the interest in political stability does *not* automatically outweigh all First Amendment rights; indeed *Elrod* and *Branti* at a very minimum establish that proposition. On this record, consisting as it does of the complaint alone, not nearly enough is known about the operation of the patronage system, its impact on the political rights of public employees and its effect, if any, on preserving political stability to justify the decision below. The point was ably made by Judge Ripple in his dissent from the panel opinion:

> [W]e know very little, on the basis of the complaint alone, about the impact of this political patronage system on the first amendment rights of job applicants. We also know very little about the justification for this political patronage system. In my view, this case should be remanded to the district court. There, after adequate development of the record, the district court will be able to accomplish several tasks that are essential to a full and fair analysis of this case: 1) a thorough examination of the operation of *this* patronage system and the effect of that operation on the plaintiff; and 2) a thorough examination of the justifications for this particular system proffered by the defendants. [848 F.2d at 1414, emphasis in original. See also *id.* at 1414-15.]

Accordingly, Judge Ripple concluded the complaint should be reinstated and the case remanded to the district court for a full development of the facts. This is the very least that is required. See also *Storer*, *supra*; cf. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

(c) To this point we have indulged the court of appeals' major premise: that *Branti* leaves open the possibility that there are classes of government positions as to which it is *improper* to take political party affiliation into account in making *discharge* decisions, but it is *proper* to take such affiliations into account in making hiring, transfer, and promotion decisions. As we have shown, even on that premise, reversal of the decision below and remand for development of the facts are in order.

As we now show, the court of appeals' premise is wrong. While *Branti* arose in the context of a discharge, its rationale invalidates political party patronage decisionmaking across the board except where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. And for the excepted class of government positions it is entirely con-

stitutional to take political party affiliation into account in making discharges as well as in making other personnel decisions.

Branti states the limit on the Constitution's protections of political party affiliation in the following terms: "[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S. at 517. And the *Branti* Court went on to explain:

> The plurality [in *Elrod*] emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government. *The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.* [445 U.S. at 517, n.12 (emphasis added).]

We cannot see any escape from the proposition that if the benefit of political patronage decisionmaking to the favored political party—and to its stability—is a "partisan interest" and not a "governmental interest" that overrides First Amendment rights in the discharge context, that benefit is, once again, a mere "partisian interest" and not a "governmental interest" in the hiring, transfer and promotion contexts. And if that is so, we can see no escape from the conclusion that political patronage decisionmaking in those regards is unconstitutional. For the reasons we have given, these are certainly "valuable governmental benefits" and denying such

benefits on political party affiliation grounds certainly adversely affects the exercise of the most basic of First Amendment rights *to some extent*. That being so, patronage decisionmaking passes constitutional muster if, and only if, justified by a legitimate overriding *governmental* interest. And *Branti* states that where political party affiliation is *not* relevant to the "effective performance of the public office involved" there is *no* such legitimate overriding government interest that justifies patronage decisionmaking.

Nor, we submit, is there any sound reason to seek to escape *Branti*'s logic. The *Branti* rule not only serves government interests but through its stated limit serves the most important interests of the political parties by saving out a host of the most important and desirable government offices from the First Amendment's proscription on patronage decisionmaking. And, as the passage from *Branti* quoted above recognizes, going further and allocating governmental resources *purely* in the interest of a partisan political party grants the favored party an advantage that threatens the legitimacy of our governmental structure. That harm greatly outweighs the supposed gains in political party stability and in avoiding litigation over government personnel decisions the court of appeals found of such moment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, and the case remanded to the District Court with directions to reinstate the complaint and for further proceedings consistent with the constitutional analysis set forth herein.

Respectfully submitted,

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Nos. 88-1872 and 88-2074

IN THE

Supreme Court of the United States

October Term, 1989

CYNTHIA RUTAN, et. al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et. al.,

Respondents,

and

MARK FRECH, et. al.,

Cross-Petitioners,

v.

CYNTHIA RUTAN, et. al.,

Cross-Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME, AND BRIEF AMICUS CURIAE OF THE NORTH CAROLINA PROFESSIONAL FIRE FIGHTERS ASSOCIATION

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On Writ of Certiorari To The United States
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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OUT OF TIME

Pursuant to Rule 36 of the Rules of this Court, Amicus Curiae North Carolina Professional Fire Fighters Association (NCPFFA) respectfully moves this Court for leave to file out

of time the attached brief as amicus curiae in support of Petitioners. Each of the parties has consented to the filing of this amicus brief and correspondence confirming this consent has been forwarded to this Court.

NCPFFA is a statewide organization in existence for more than a decade consisting of thirteen local fire fighter associations throughout the State of North Carolina. NCPFFA has appeared as amicus in other federal constitutional litigation including litigation involving First Amendment rights of public employees. NCPFFA and its members are vitally interested in the important constitutional issues before this Court. The issues before this Court affect NCPFFA, the public interest, and the civil liberties of public employees throughout the nation.

To ensure that this Court is fully aware of the gravity of this case, NCPFFA has prepared the accompanying amicus brief. NCPFFA and its counsel only learned of this case on November 13, 1989, some seven days before petitioners' brief was due. The time necessary for obtaining requisite approval and preparation of the accompanying brief unfortunately prevented its timely filing. Consent to file this brief from all of the parties was not obtained until November 17, 1989.

WHEREFORE, NCPFFA respectfully moves this Court for leave to file out of time the attached brief as amicus curiae.

Respectfully submitted,

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BRIEF OF THE NORTH CAROLINA PROFESSIONAL FIRE FIGHTERS ASSOCIATION AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

NCPFFA's interest is set forth in the foregoing motion for leave to file this brief and herein amplified.

STATEMENT OF THE CASE

NCPFFA adopts the statement of the case as presented by Petitioners.

SUMMARY OF ARGUMENT

Respondents' political patronage scheme is unconstitutional because it severely punishes applicants and employees for the exercise of their true political beliefs and associations. Respondents' scheme seeks to promote partisan objectives through direct coercion in employment practices which subverts the essence of the First Amendment.

ARGUMENT

I. THE NATURE OF RESPONDENTS' PATRONAGE SCHEME AND THE APPLICATION OF STRICT SCRUTINY COMPEL THE CONCLUSION THAT RESPONDENTS' SCHEME IS UNCONSTITUTIONAL

The fundamental issue before this Court is whether the First Amendment prohibits a governmental employer from using a rigid partisan political litmus test when hiring, promoting, transferring or recalling employees from layoff. May government condition hiring, promotion, transfer or recall from layoff upon direct political support, even including

financial contribution to a particular political party or candidate?

The pervasive patronage scheme in issue here employs the most strict political test as the threshold standard for the entire spectrum of employment decisions. Respondents' patronage system thrives on the raw exercise of party politics. This abusive exercise of political power is thrust into the mainstream of day-to-day jobs. Respondents' patronage plan pervasively affects the essential means of subsistence for substantial numbers of citizens. The logical conclusion of the Seventh Circuit's decision below will inject unnecessary and harmful partisan politics into the general day-to-day affairs of basic American public administration.

Respondents' patronage practices are tantamount to the loyalty oaths struck down by this Court in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Torcasco v. Watkins*, 367 U.S. 488 (1961). Respondents' patronage scheme is so explicit that it in effect requires a loyalty oath to the Republican Party in order to be hired, promoted, transferred or recalled from layoff. Respondents' employment policy is a relic of the past: to the victor goes the spoils. The occupational liberty interests of scores of citizens are trampled by Respondents' political pressure tactics.

In deciding these grave constitutional issues, this Court must employ its most strict and exacting scrutiny. In the precise context of patronage employment practices, this Court's seminal decision explained that "[i]t is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). In *Elrod*, this Court explained that such a First Amendment "encroachment 'cannot be justified upon a mere showing of a legitimate state interest.'" *Id.* quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). "The interest advanced lust be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* This Court's recent cases have similarly held that governmental conduct must survive the most strict scrutiny where First Amendment

rights are at stake. *E.g., Eu v. San Francisco County Democratic National Commission*, 109 S.Ct. 1013, 1021 (1989) (compelling governmental interest is needed in order to burden free speech or association); *Hobie v. Unemployment Appeals Commission of Florida*, 107 S.Ct. 1046, 1049 (1987) (strict scrutiny applied; no compelling governmental interest established to override First Amendment protection). *Accord Shelton v. Tucker*, 364 U.S. 479, 485 (1960).

In *Elrod*, this Court enunciated the complete methodological analysis to be employed in assessing the constitutionality of patronage systems in employment. The government must utilize means closely drawn to avoid unnecessary abridgement of First Amendment rights. 427 U.S. at 362-63. It is not enough that that means chosen be rationally related. *Id.* at 362. If a less drastic means is available, the government may not choose a scheme that tramples First Amendment freedoms. *Id.* at 363. In essence, if a patronage employment system is to survive constitutional attack,

> it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. 427 U.S. at 363.

Applying the foregoing analysis to the case *sub judice* mandates a finding that Respondents' pervasive patronage scheme is unconstitutional. Justice Brennan's plurality opinion in *Elrod* thoroughly addressed the various alleged interests served by patronage. Here, the Seventh Circuit failed to heed the methodological analysis set forth in *Elrod* and its progeny. Rather than employing the strict scrutiny mandated by *Elrod* and other decisions of this Court, the Seventh Circuit erroneously reasoned instead that "courts must afford the political process and political institutions great deference." 868 F.2d at 953. This case does not involve some mere deference;

it involves the most rigid form of partisan litmus test. The Seventh Circuit erroneously relied upon other considerations in support of patronage which this Court flatly rejected in both *Elrod* and *Branti v. Finkel*, 445 U.S. 507 (1980).

The fundamental interest served by Respondents' patronage scheme is the enhancement of political power and growth of the Republican Party. Patronage is a partisan rather than a governmental interest. Such partisan interests do not even constitute legitimate governmental interests much less the sort of "vital" government interest required to survive strict scrutiny. *Elrod*, 427 U.S. at 362-64. Patronage is not an appropriate means to implement a democratic mandate. *Id.* at 367-70. Nor does patronage further governmental efficiency, promote loyalty of employees or preserve the democratic process. *Id.* Rather, patronage "is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." *Id.* at 357. Patronage employment practices are fundamentally at odds with traditionally accepted employment criteria of merit, qualifications, performance, and other factors reasonably related to the enhancement of productivity and efficiency. In *Elrod*, this Court flatly rejected the proposition that patronage promotes efficient government. "At all events, less drastic means for insuring government effectiveness and employee efficiency are available for the state." 427 U.S. at 366.

The Seventh Circuit relied upon the alleged historic use of patronage as "a longstanding feature of American politics." 868 F.2d at 947, 953. Sadly enough, other similar forms of invidious discrimination in employment, housing, land use, and other areas were accepted for years before this Court brought the injustice to an end. *E.g., Brown v. Board of Education*, 347 U.S. 483 (1954). In *Elrod* and *Branti*, this Court recognized the unconstitutionality and ill effects of patronage employment practices. Respondents would have this Court return to the days where "to the victor goes the spoils." First Amendment rights are not bartering tools for nepotism by

politicos. The whim of politicians cannot be allowed to abrogate the essence of the First Amendment.

II. THE FIRST AMENDMENT AND THE DOCTRINES IN *ELROD* AND *BRANTI* APPLY TO PROHIBIT HIRING, PROMOTION, TRANSFER AND RECALL FROM LAYOFF DUE TO POLITICAL PATRONAGE, AFFILIATION OR BELIEFS

As Senator Sam Ervin explained in his authoritative treatise: "First Amendment freedoms are often grossly abused." Ervin, *Preserving The Constitution* 210 (1984). This case demonstrates gross abuse, calling into question the essence of the First Amendment in the context of a modern political spoils system. The *en banc* decision of the Seventh Circuit below, 868 F.2d 943, enunciated an unworkable standard misconstruing the scope of this Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980). As amply articulated by Judge Ripple in his dissenting opinions, the Seventh Circuit's approach "is simply a manifestation of its willingness to tolerate 'minor punishment' for the legitimate exercise of first amendment rights." *Rutan*, 868 F.2d at 959 (7th Cir. 1989) (en banc); 848 F.2d at 1412 (7th Cir. 1988).

A plethora of cases from this Court demonstrate the historical impropriety of the overt use of politics by governmental officials in everyday employment relations which do not involve senior policy makers. *E.g., West Va. Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein."); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("constitutional protection does extend to the public servant whose exclusion... is patently arbitrary or discriminatory.") This Court has

emphatically underscored the historic broad sweep of constitutional protection for public employees. *E.g., Wieman, 344 U.S. at 192; Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Rankin v. McPherson*, 483 U.S. 378 (1987).

The constitutional right to support a particular political party or candidate is firmly rooted in the American tradition. *E.g., Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1019-21 (1989); *Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544, 548 (1986); *Elrod v. Burns*, 427 U.S. 347 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). This Court has similarly recognized that the First Amendment affords protection for *not* supporting a particular political party or candidate. *E.g., Hudson v. Chicago Teachers Union*, 475 U.S. 292 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 222, 230, 235-36 (1977); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987). This Court has firmly recognized the critical importance of safeguarding the constitutional rights of public employees and the severity of depriving citizens of the means of livelihood. *E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985); ("We have frequently recognized the severity of depriving a person of the means of livelihood."); *Green v. McElroy*, 360 U.S. 474 (1960). The First Amendment prohibits the overt use of partisan politics in the day-to-day administration of non-policymaking applicants and personnel.

III. APPLICANTS FOR PUBLIC EMPLOYMENT ARE PROTECTED FROM POLITICAL COERCION AND PATRONAGE IN HIRING

The Seventh Circuit's decision in the case *sub judice* runs afoul of this Courts' reasoning in *Elrod* and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Perry*, this Court reasoned that government:

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech... We have applied the principles regardless of the public employees' contractual or other claim to a job. 408 U.S. at 597.

In *Elrod*, this Court observed:

> in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), the Court recognized again that the government could not *deny* employment because of previous membership in a particular party. 427 U.S. at 358 (emphasis added).

The Court's emphasis in *Elrod* upon the *denial* of employment as opposed to dismissal indicates that the *Elrod* principle applies to hiring. The trilogy of *Cafeteria Workers*, *Perry* and *Elrod* underscores the meaningful application of the First Amendment to both applicants and employees, regardless of the particular status of the person. One simply does not lose First Amendment protection based on some lack of status; all persons are protected in their freedom of political belief and association. *Accord United States v. Robel*, 389 U.S. 258 (1967) (membership in the communist party may not bar a

person from employment in defense establishments important to national security).

In *Branti*, this Court's analysis also provides that the First Amendment protects individuals from political coercion in "either the selection or retention" of public employees. 445 U.S. at 519 n. 14. The specific use of the phrase "selection or retention" compels the conclusion that *Branti* contemplated First Amendment protection in hiring and selection, particularly since Justice Powell specifically indicated that one can construe *Branti* to include patronage hiring. *Branti*, 445 U.S at 522 n. 2 (Powell, J., dissenting). Justice Powell also suggested in *Elrod* that a First Amendment claim may be more significant when the issue involves patronage hiring rather than dismissals. *Elrod*, 427 U.S. at 381 n. 4 (Powell, J., dissenting).

In *Branti*, this Court focused upon the prohibition of political coercion in the *selection* process on three separate occasions in a single footnote. 445 U.S. at 519 n. 14. There, this Court raised the most interesting argument: "By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime?" *Id.* Most recently, in *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) and *Frazee v. Illinois Department of Employment Security*, 109 S.Ct. 1514 (1989), this Court reaffirmed the fundamental notion that an employment applicant enjoys First Amendment protection. *Accord Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967) (loyalty oath applicable to both applicants for employment and employees stricken). The Circuit Courts are in accord. *E.g., Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3rd Cir. 1977), *cert. denied*, 434 U.S. 892 (1977) (hiring or discharge may not be conditioned in a manner infringing on an employee's or applicant's rights of political association); *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) ("A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment."); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir.

1987) (same); *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988).

A plethora of federal courts and commentators have consistently recognized that the First Amendment protects hiring as well as discharge. *E.g.*, Comment, *Republicans Only Need Apply: Patronage Hiring and the First Amendment in Avery v. Jennings*, 71 Minn. L. Rev. 1374, 1378 n. 23 (1987) (collecting cases and articles); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chicago L. Rev. 181, 195 n. 94, 200-01 (1982) (same); *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546, 552 (E.D.N.Y. 1977), *appeal dismissed*, 566 F.2d 846 (2nd Cir. 1977) (denial of employment or promotion cannot be conditioned on making political contributions).

No First Amendment values inhere in the alleged distinction between discharge and failure to hire. The alleged distinction is merely a hyper-technical, formalistic distinction wholly unrelated to any principles of free speech or association. It is a distinction without substance. As this Court noted in *Elrod*, "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." 427 U.S. at 359-60 n. 13.

IV. APPLICANTS FOR PUBLIC EMPLOYMENT ARE AFFORDED CONSTITUTIONAL PROTECTION FROM INVIDIOUS DISCRIMINATION

Numerous cases have recognized that failure to hire because of an impermissible reason contravenes the Fourteenth Amendment. *E.g., Hill v. Met. Atlanta Rapid Transit Auth.*, 841 F.2d 1533 (11th Cir. 1988) (failure to hire due to race); *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986) (same); *Van Houdnos v. Evans*, 807 F.2d 648 (7th Cir. 1986) (failure to hire due to sex). *Cf. Brady v. Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988) (substantive due process contravened by

denying building permit due to political animus); *Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir. 1988) (same). In short, there are no legally significant distinctions between the constitutional rights of employees and job applicants. The First and Fourteenth Amendments prohibit invidious class based discrimination in all aspects of employment relations. There is simply no distinction justifying protection against discrimination by the Fourteenth Amendment while subverting the First Amendment interests to a substantially inferior position.

V. SUBSTANTIVE DUE PROCESS PRECLUDES THE DENIAL OF PUBLIC BENEFITS DUE TO POLITICAL ANIMUS

This Court has recently breathed new life into the doctrine of substantive due process. *E.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the touchstone of due process is the "protection of the individual against arbitrary action of government..."); *see id.* at 337-38 (Stevens, J., concurring); *United States v. Salerno*, 107 S.Ct. 2095, 2101 (1987) (shocks the conscience approach); *Federal Deposit Ins. Corp. v. Mallen*, 108 S.Ct. 1780, 1787 (1988) (Due Process Clause prohibits arbitrary governmental interference with private sector employment relation). *See* McGuinness, *The New Substantive Due Process: Theory, Proof & Damages*, 24 New England L. Rev. (forthcoming February 1990; analyzing contemporary substantive due process in numerous contexts including public employment). Throughout our history, this Court has continued to proclaim that there is no place in our constitutional system for the arbitrary or abusive exercise of governmental power. *E.g., Bank of Columbia v. Okely*, 17 U.S. (4 Wheat) 235, 244 (1819); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("our institutions of government do not mean to leave room for the play and action of purely personal and arbitrary power..."); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The circuit courts have taken the lead from this Court and have applied substantive due process prohibiting the denial or interference with public benefits because of political factors. *E.g., Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir. 1988) (interference with building permit process for partisan political reasons contravenes substantive due process); *Brady v. Colchester*, 863 F.2d 205, 216 (2nd Cir. 1988) (substantive due process precludes the denial of a building permit due to political animus).

These cases demonstrate that raw politics and patronage are impermissible considerations in governmental allocation of a variety of public benefits. Whether in land use, building permit disputes, licensing, or in public employment, partisan politics is inappropriate because it is wholly unrelated to the merits and without rational basis. Respondents' patronage scheme represents the most blatant form of arbitrary and capricious governmental action that is inherently repugnant to traditional American constitutional values.

CONCLUSION

For the foregoing reasons, Amicus Curiae NCPFFA respectfully requests that this Court reverse the decision of the Seventh Circuit and remand this case for trial.

Respectfully submitted,

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Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, et al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Respondents,

and

MARK FRECH, et al.,

Cross-Petitioners,

v.

CYNTHIA RUTAN, et al.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PUERTO RICO

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF AMICUS CURIAE COMMONWEALTH OF PUERTO RICO

The Puerto Rico Public Service Personnel Act, 3 L.P.R.A. §§1301-1431, establishes a broad base of merit-oriented civil service embracing the vast majority of public employees, but leaves room for some personnel actions based on political affiliation with regard to a fairly small number of positions (no more than 25 per agency) clas-

sified as confidential, a system similar to the Senior Executive Service for upper-level federal managers and professionals established by Title IV of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1154-79 (1978) (codified in scattered sections of 5 U.S.C. (1982)). Extension of the *Elrod-Branti* doctrine to all personnel actions based on political affiliation would wreck this system adopted by the Puerto Rico Legislature in view of local conditions to structure government employment in the public interest. Such extension would seriously impair responsible and efficient governance in Puerto Rico and remove vital decisions affecting the administration of the Commonwealth's personnel service system from the discretion of its legislative and executive officials, placing them in the hands of federal judges and juries.

INTRODUCTORY STATEMENT

Briefly stated, the facts are as follows: Plaintiffs are former and present State of Illinois employees who brought action against state government officials challenging the use of political considerations in hiring, rehiring, promoting, and transferring employees. According to their allegations, the public employer (1) failed to hire one of the applicants while other applicants affiliated with the Republican Party have been hired in positions for which he was qualified; (2) denied promotions or desired transfers to some of the plaintiffs due to their political affiliation; and (3) failed to rehire some of the plaintiffs due to their political affiliation. The district court dismissed the complaint in its entirety for failure to state a claim upon which relief can be granted.

On rehearing *en banc*, the Seventh Circuit held *First*, that the applicant for public employment who alleged that jobs were awarded to less qualified, but politically favored persons, did not state a claim because patronage hiring practices are not prohibited by the First Amendment under the *Elrod-Branti* doctrine; *Second*, that public employees who alleged that they were denied promotions that went to less qualified but politically favored persons or were denied a desired transfer for lack of Republican Party support, stated claims for violation of the First Amendment since it may appear after trial that the denial of promotion or transfer was the substantial equivalent of a dismissal; and *Third*, that failure to rehire after layoff does not in and of itself violate the rule enunciated in *Elrod-Branti*, because many laid off employees stand essentially in the position of new job applicants when they seek a position, but, if a formal or informal system exists for placing employees into other positions, or reinstating them to their jobs, failure to do so may be the substantial equivalent of a termination from employment. Therefore, the district court on remand must look at all the facts and circumstances to determine whether failure to rehire after layoff was substantially equivalent to a discharge.

In short, the Seventh Circuit ruled that patronage hiring practices are not prohibited under *Branti* and *Elrod*. To resolve the constitutionality of patronage decisions in situations involving denial of promotions, transfers and rehiring, and other practices that fall short of dismissal, the Seventh Circuit adopted "a substantial equivalent of dismissal standard" which "focuses on the same question presented in constructive discharge cases, that is, whether a particular patronage decision would lead a reasonable person in the plaintiff's position to feel compelled to leave

his job." *Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 950 (7th Cir. 1989).

Amicus respectfully urges the Court to affirm the Court of Appeals' decision in *Rutan* and to hold that the principle of *Elrod* and *Branti* is limited to an actual or threatened dismissal and to a constructive dismissal substantially equivalent to a discharge because a reasonable person in the employee's position would be forced to quit his job.

SUMMARY OF ARGUMENT

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Court curtailed the dismissal or threat of dismissal of existing employees because it "...inhibits... belief and association through the conditioning of public employment on political faith" and "...penalizes its exercise." At 357 and 359. In *Branti* v. *Finkel*, 445 U.S. 507 (1980), the Court again only considered patronage discharges which have "...the inevitable tendency... to coerce employees into compromising their true beliefs." At 513.

The state's failure to hire an employee does not impose a comparable burden on First Amendment freedoms. Denial of one opportunity for compensation by failure to hire is not comparable to the disruption and hardship caused by an individual's loss of his only job. The applicant who is blocked by patronage is cut off from a relatively small segment of the entire job market. It is not the end of the world for him. There are other government entities to bid to, and private ones as well. It is not like losing his job which might well result in a protracted period of search following discharge and in a substantially less well-paid job thereby inhibiting government workers from taking political stands adverse to their superiors. An

applicant for government employment who fails to get a job due to his political affiliation undoubtedly suffers less psychological and financial pressure than an employee who has been fired and has lost his job.

Against any impairment of First Amendment interests resulting from patronage hiring, one must balance the state's interests. The prospect of employment is a significant incentive to political effort, contributing to improve the democratic process. In addition, opportunities to implement the administration's democratic mandate are enhanced significantly by patronage hiring. These are compelling state interests which outweigh the possible First Amendment impairment resulting from patronage hiring.

As noted in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 282-84 (1986), the pain to the individual from the loss of existing employment is much greater than the loss of one of a numb... of possible employment opportunities. On the other hand, the potential advantage to an effective and vigorous government of choosing sympathetic and enthusiastic employees is much greater than the gain from dismissal of existing employees who are subject to dismissal for deviations from satisfactory performance.

Public employees should have no constitutional claim for failure to be promoted, transferred or rehired for political reasons, unless such failure is substantially equivalent to dismissal. Real differences exist between dismissals and other patronage practices. Although favoring political supporters by promotions, transfers, or rehiring may have some negative effects on people who did not support the party in power, the burden imposed by such patronage practices is much less significant than losing a job. A public employee has a very important stake in his position with the government. His financial affairs and other obligations are arranged around settled expectations

that his job will continue. Thus the coercion and control that a public employer may exercise over an employee by dismissal or threat of termination is great. A failure to obtain a promotion, transfer or other employment benefit, imposes more limited burdens on First Amendment rights. Weighed against the needs of efficient government and the right of the electorate to designate the policies that will be carried out by elected officials, such burdens do not give rise to a constitutional claim.

In the absence of significant intrusion on First Amendment freedoms, and in view of the important state interests advanced by patronage practices that fall short of dismissal, this Court should not extend the *Elrod-Branti* principles beyond actual dismissals or constructive discharges. Removing patronage decisions on promotions, transfers, and the granting of other possible benefits from the discretion of legislative and executive officials, is not justified under the *Elrod-Branti* test of balancing the cost of patronage with the state interests in effective government. Such an extension would represent a significant intrusion into the area of local legislative and executive policies, seriously impair the functions of government in the Commonwealth, and in practice require federal judges to become arbiters and administrators of the Commonwealth civil service system.

ARGUMENT

In *Elrod*, the assessment of competing interests and formulation of a balancing rule that is the core of the Court's plurality opinion was expressly confined to patronage dismissals:

> "Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." 427 U.S., at 353.

The concurring justices that completed the majority also expressly disavowed any intention to set out a constitutional rule for other patronage practices. *Elrod*, 427 U.S. at 374. In *Branti* the majority opinion again explicitly confined its decision to the "...dismissal of public employees for partisan reasons." *Branti*, 445 U.S. at 513, note (7). This Court must now determine whether politically motivated hiring decisions in government employment, or for those already employed, adverse personnel actions that fall short of dismissal, also burden the rights of political association and belief in such manner, and without any legitimate state interest that would justify them, so as to rise to the level of a First Amendment infringement.

Elrod and *Branti* recognized that public employees' individual free speech and association interests have to be balanced with the collective interest, implemented by a freely chosen political administration, of giving effect to the electoral choices of the people. Thus not all politically motivated public personnel practices were considered banned by the First Amendment and indeed some were considered part and parcel of the democratic process. Justice Powell in his *Elrod* dissent aptly summarized the history of patronage in the American democratic system and its vital role in the partisan electoral process upon which said system is based. *Elrod*, 427 U.S. at 378-80. The confidential and policy making exceptions to the *Elrod-Branti* ban on political dismissals is a recognition of such realities. *Elrod*, 427 U.S. at 367.

The loss of a person's means of economic survival, his job, was considered in *Elrod* and *Branti* so vitally

important to most people as to justify the assumption that employees will refrain from political expressions and action in order not to lose their jobs. Such intrusion into First Amendment protected activity could only be permitted when the state showed an overriding interest in being able to implement electoral choices unhindered by unsympathetic employees. Such an overriding state interest, as indicated in the *Elrod-Branti* doctrine, requires a demonstration by the government that the nature of the job or position is so politically sensitive or confidential that partisan loyalty is an appropriate requirement for the job.

Loss of employment is such a radical alteration of a person's life that such an event was deemed enough to persuade most people to involuntarily change their politics or abstain from them. It is submitted that for those seeking employment, not being considered for one of a number of possible employment opportunities is considerably less disruptive, and for those already employed by the government, being the object of an adverse personnel action, but with the job itself still secure, is even less of a disruption. Therefore, the *Elrod-Branti* test of balancing the cost of patronage in the restraint it places on freedom of belief and associations (427 U.S. at 355) with the state interests in effective government (427 U.S. at 364) should tip the scales in favor of respondents on the two issues presented in this case.

A. Hiring

This Court has held that under the First Amendment, and the due process and equal protection components of the Fourteenth Amendment, no government, state or federal, can pass an over-broad and vague law or regulation permanently, automatically and arbitrarily barring persons of a particular political affiliation from ever holding

any position in government. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947); *Weiman* v. *Updegraff*, 344 U.S. 183, 191-92 (1952); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 606 (1967). The issue posed in those cases is fundamentally different from patronage hiring because the electoral process in a democratic society precisely guarantees that no political party will perpetually hold power at all levels of government. In fact, political patronage itself will guarantee change because it promotes citizen participation in the electoral process.

In the context of racially discriminatory state procedures for the appointment of persons to public office in state agencies this Court has ruled in *Turner* v. *Fouche*, 396 U.S. 346, 362-63 (1970):

> "We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees."

The *Turner* decision, however, is not relevant to the present case because race as a qualifying criteria is a permanent, absolute disqualification that does not promote popular participation in the electoral process as does political patronage. In fact, the decline of political patronage systems in big cities has deprived minorities and the poor of opportunities for advancement and political participation. Piven, *Federal Policy and Urban Fiscal Strain*,

2 Yale L. & Policy Rev. 291, 302-11 (1984), cited in *Avery* v. *Jennings*, 786 F.2d 233, 236 (6th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986). Simply put, racially discriminatory criteria in government employment hiring procedures do not advance any collective interest that could ever justify the burden it imposes on constitutional values.

Conceding that the use of political criteria in the government employment hiring process can implicate some burden on First Amendment values, it is submitted that very strong state interests clearly outweigh any such burden that could be felt by one aspiring to a government job and, therefore, no infringement of the First Amendment should be found. All federal courts that have considered the issue have so determined. There are three reported federal cases directly on point as to the issue of political patronage hiring. The present case reported at 868 F.2d 943 (7th Cir. 1989) and two Sixth Circuit cases: *Avery* v. *Jennings*, *supra*, and *Messer* v. *Curci*, 881 F.2d 219 (6th Cir. 1989).

Similar considerations have led federal circuit courts to deny extension of the *Elrod-Branti* doctrine to claims by government contractors of political discrimination in the denial of new contracts. *LaFalce* v. *Houston*, 712 F.2d 292, 294 (7th Cir. 1983) *cert. denied*, 464 U.S. 1044 (1984). The same treatment has been given to claims of political discrimination in the termination of existing contracts or contractors' positions. *Horn* v. *Kean*, 796 F.2d 668 (3rd Cir. 1986); *Sweeney* v. *Bond*, 669 F.2d 542, 545-56 (8th Cir. 1982), *cert. denied*, sub nom. *Schenberg* v. *Bond*, 459 U.S. 878 (1982).

The common thread that runs through all these cases is that, in addition to the analysis of competing interests between efficient government and individual restraints on freedoms of belief and association, it would be unwise for

the federal judiciary to impose its particular solution to a long standing political controversy that is best left to the electoral process to resolve. The people of each state can decide through the competing forces of the electoral process what kind of civil service system they prefer. Through state laws they should be free to design a civil service system that permits or not the use of political affiliation considerations in the allocation of government jobs in whatever degree and level of employment they deem wise. Extending the vague and intractable *Elrod-Branti* patronage dismissal ban would weaken the most cherished First Amendment value, the right of the people to consider the alternatives and then choose for themselves the kind of government they think best suits their needs.

B. Adverse Personnel Actions Short of Dismissal

The raison d'être of the doctrine established in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), *Connick* v. *Myers*, 461 U.S. 138 (1983), *Rankin, et al.* v. *McPherson*, 483 U.S. 378 (1987), *Elrod* v. *Burns*, *supra*, and *Branti* v. *Finkel*, *supra*, is to protect the exercise of First Amendment rights by public employees by insulating them from dismissals motivated by his/her exercise of their expressive and/or associational rights, when such expressive and/or associational activities do not negatively affect legitimate interests of the public employer such as workplace discipline and efficiency (*Pickering*, *Connick* and *Rankin*) or the proper implementation of politically sensitive government programs and/or the integrity of politically sensitive confidential working relationships (*Elrod* and *Branti*). Thus, the employment relationship or status as an employee is what cannot be negatively affected by the public employer.

As we have already explained, the loss of a job has such great economic impact that an employee could reasonably be expected to abstain from exercising his expressive and associational rights in order to avoid a dismissal. Even considering the great importance of political patronage in the democratic process, the burden on First Amendment rights of ordinary employees produced by politically motivated dismissals is enough in magnitude to justify a finding of a constitutional infringement. But an adverse personnel action short of dismissal, even though motivated by political reasons, does not produce a burden on expressive and associational activities of the employee of such magnitude as to justify a finding of a First Amendment infringement.

Such personnel actions, as for example, denial of a promotion or of a desired transfer, alteration or change of duties within the general competence of the position held, and others of similar nature, when the present job or employment remains secure, is so significantly less coercive and disruptive than a dismissal or threat of dismissal that an extension of the *Elrod-Branti* rule to them is not justified. An employee, with his present job secure, is less likely to change his political associations or abstain from them, because his job advancement opportunities are now diminished or his job situation is now less desirable than when his partisans were in charge.

As indicated in *Delong* v. *United States*, 621 F.2d 618 (4th Cir. 1980), when the *Elrod-Branti* principle "...is applied to patronage practices other than dismissal, it is rightly confined to those that can be determined to be the substantial equivalent of dismissal... In applying the principles, so limited, to the actual or threatened reassignment or transfer of a government employee, the issue thus becomes whether the specific reassignment or transfer does in fact impose upon the employee such a Hobson's choice between resignation and surrender of protected rights as to be tantamount to outright dismissal." At 624. This is undoubtedly a rational and sensible test. Limiting the *Elrod-Branti* rule to actual dismissals or threats of dismissals and constructive discharges will provide reasonable protection to First Amendment values without unduly interfering with the state political process. Extending the *Elrod-Branti* doctrine to all adverse personnel actions will severely interfere with the management of state public personnel matters and place an intolerable burden on the federal courts.

There are multiple governmental interests and purposes totally independent of partisan concerns that could be affected if routinary personnel decisions and actions were to be subject to judicial scrutiny for possible political motivations which in some instances may be inextricably mingled with legitimate motives. In many occasions incoming supervisory officials will want to make good faith changes related to the employees' circumstances, in order to improve efficiency, implement their own policies and even correct what they perceive as past mistakes or illegalities. Many times the underlying rationale will be a subjective impression on how the office would run better. Political opponents are more likely to resist these changes and perceive them as adverse to their interest in preserving the previous status. However legitimately and sincerely justified the contemplated changes may be, due to this circumstantial or incidental effect on the interests of political adversaries, the incoming officer would risk facing numerous judicial complaints and having to prove objective rationales to defend himself from imputations of political motivation.

Likewise, the possibility that non-partisan efforts to maintain discipline and loyalty will bring about personal clashes with political adversaries and result in lawsuits will have a dampening effect on the state officials' right to take measures to that end. They would feel constrained to avoid animosity or strained relationships with adversaries or non-partisans and even the use of any language or expressions to which political undertones may be ascribed. Efficiency in the provision of government services will be negatively affected.

The *Delong* and *Rutan* decisions represent the wisest course of action and this Court should adopt their position on this matter. The constructive dismissal rule, which has been well developed in other employment law contexts by both federal and state courts, protects both public employees' and employers' interests in the employment relationship. The employee is protected from abusive working conditions designed to obtain indirectly for the employer what is barred to it from doing directly (dismissing the employee for a legally prohibited reason or motive). On the other hand, said doctrine protects the employer's legitimate interest in the efficient administration of the workplace by rejecting or not recognizing disruptive, exaggerated, selfish or purely personally convenient employee demands regarding job conditions and workplace organization.

It is proposed that this Court adopt the constructive dismissal rule with the following guidelines to be uniformly applied: First, the personnel actions necessary to bring into action the First Amendment protections must radically change the basic elements of the employment relationship to such a negative or adverse degree that any reasonable person will be justified in concluding that the changes are intended to force the employee to resign.

Second, in the process of evaluating the reasonableness of the employee's conclusion as to the intolerability of the changes in the working conditions, an objective standard must be used which measures the employee's expectations in the context of the particular job position in question, the applicable statutes and administrative regulations and the prior practices and usages of the workplace.

Third, when in effect a constructive dismissal situation has been created by the public employer, the employee does not have to resign in order to be able to claim his rights because such situation is the same as a threat of dismissal expressly articulated by the employer as in the *Elrod* case.

Fourth, if the elements above mentioned are established, thus proving a constructive dismissal of the plaintiff, then plaintiff must show that said action was taken because of the employee's political beliefs and affiliations.

Fifth, once all the aforementioned elements are proven then the case proceeds, guided by the *Elrod-Branti* rules used for express dismissal situations. For example, if a demotion with a transfer and a pay cut were to be adjudged as a constructive dismissal, and the plaintiff proves that said action was taken because of his political affiliation, the public employer could still prove that the nature of the employee's former position (the one from which he/she was demoted) was such in terms of the policy making-confidential duties test that political considerations could be an appropriate criteria for the changes made in plaintiff's working conditions.

The solutions herein proposed for the two basic issues posed for review in this case will implement the values protected by the First Amendment and also recog-

nize the state's authority to administer its agencies and departments with the least possible intervention by the federal courts. Those who are employees will be protected as to the basic elements of their employment relationship or status. The state, however, is given sufficient leeway to hire its workers and organize the public workplace according to its views and policies of how a particular agency or department should function. The wisdom of such workplace personnel hiring and organizational policies and their impact upon the populace served by state governments should not be judged by the federal courts, but by the people through the electoral process.

The First Circuit's *en banc* decision in *Agosto de Feliciano* v. *Aponte Roque* (No. 86-1300) and two other related cases (Nos. 86-1643 and 86-1644) entered on December 8, 1989 summarily rejects the constructive discharge standard.[1] It sets forth a new "unreasonably inferior" test for determining "whether and under what circumstances public employer action, short of dismissal, adversely affecting a career employee, based solely on the latter's political affiliation, should be held to violate the First Amendment right of free association." Appendix, A-10.

The main reason advanced for rejecting the constructive discharge norm adopted in *Rutan* and *Delong* is that "...if we used such a standard, we would be holding that an employee's First Amendment right is significantly bur-

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[1] The opinions rendered by the First Circuit have not yet been published. The majority opinion was written by Senior Circuit Judge Coffin. Two concurring opinions were filed by Chief Judge Campbell and Judge Breyer, who also dissented in one of the three cases decided by the Court of Appeals. Judge Torruella filed a dissenting opinion. The various opinions are printed in the appendix to this amicus brief.

dened only when he or she has, in effect, been fired for the exercise of that right." Appendix, A-17. It is well established, however, that when a constructive dismissal situation has been created by the employer, the employee need not resign in order to claim his rights. The situation would be analogous to a threat of dismissal expressly articulated by the employer. Moreover, as Chief Judge Campbell in his concurring opinion points out, the "unreasonably inferior" standard does not adequately protect the government's interests in "making needed reorganizations and personnel shifts" and therefore "...the voters' mandate for change may go unheeded." Appendix, A-30. The "doubts" expressed by Judge Breyer in his concurrence emphasize the dangers of the position adopted by the First Circuit. Amicus joins Chief Judge Campbell in his "hope" that "...th[is] Court will decide *against* allowing state employees to sue for job changes that fall short of actual or constructive discharges." Appendix, A-30.

CONCLUSION

This Court should affirm the Seventh Circuit's decision in *Rutan* and hold that the principle of *Elrod* and *Branti* is limited to actual, threatened or constructive dismissals.

Respectfully submitted,

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December 18, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1300

MARIA M. AGOSTO DE FELICIANO, ET AL.,
Plaintiffs, Appellees,

v.

AWILDA APONTE ROQUE, ETC., ET AL.,
Defendants, Appellants.

No. 86-1643

MARIA TERESA TORRES HERNANDEZ, ET AL.,
Plaintiffs, Appellees,

v.

PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellants.

No. 86-1644

MARIA TERESA TORRES HERNANDEZ,
Plaintiff, Appellant,

v.

PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: December 8, 1989

These causes came on to be reheard on petition for rehearing en banc.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgments of the district court are vacated and the cases are remanded to the district court for further proceedings consistent with the opinion filed this date.

No costs.

By the Court:
Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1300
MARIA M. AGOSTO-DE-FELICIANO, ET AL.,
Plaintiffs, Appellees,
v.
AWILDA APONTE-ROQUE, ETC., ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

No. 86-1643
MARIA TERESA TORRES-HERNANDEZ, ET AL.,
Plaintiffs, Appellees,
v.
PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellants.

No. 86-1644
MARIA TERESA TORRES-HERNANDEZ,
Plaintiff, Appellant,
v.
PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Juan M. Perez-Gimenez, Jr., *U.S. District Judge*]

Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella and Selya,
Circuit Judges.

Jose Hamid Rivera with whom *Saldana, Rey, Moran & Alvarado*, *Hon. Hector Rivera Cruz*, Secretary of Justice, and *Hon. Rafael Ortiz Carrion*, Solicitor General, were on supplemental brief for appellant Awilda Aponte-Roque.

Pedro Juan Perez Nieves with whom *Saldana, Rey, Moran & Alvarado, Hon. Hector Rivera Cruz*, Secretary of Justice, and *Hon. Rafael Ortiz Carrion*, Solicitor General, were on supplemental brief for Pedro A. Padilla, et al.

Pedro Mirando Corrada with whom *Hector Urgell Cuebas* and *Jose Roberto Feijoo* were on supplemental brief for appellees Maria M. Agosto-De-Feliciano, et al.

Eliezer Aldarondo Ortiz, Miguel Pagan and *Aldarondo & Lopez Bras* on supplemental brief for Maria Teresa Torres-Hernandez.

DECEMBER 8, 1989

OPINION EN BANC

COFFIN, *Senior Circuit Judge*. Panel decisions in these two cases were withdrawn and both cases were reheard en banc. The issues common to both are whether and under what standards the protections of *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), should be available to government employees whose employment, while not terminated, was subjected to less advantageous conditions and responsibilities because of the employees' political affiliation. We convey our views on those legal questions here, and remand for application of the standard to the particular facts of each case.

These cases represent a second wave in a tide of litigation arising out of changes in political administrations in Puerto Rico. The first wave involved outright

dismissals and has produced a substantial number of opinions[1]. In all of these our task was to determine, in accordance with both *Elrod* and *Branti*, (1) whether the agency in which a discharged plaintiff had served was engaged in activity whose direction or pace properly could be affected by partisan political considerations, and (2) whether the particular position of the plaintiff was a policymaking or confidential one. On the basis of these criteria, we considered whether the plaintiff's job was protected against politically motivated discharge. Here the plaintiffs have protected status, and they have not been discharged; the question at issue is what type of employer action short of dismissal will support a claim for violation of the plaintiffs' right of free political association.

[1] *See, e.g., Figueroa Rodriguez* v. *Lopez Rivera*, 878 F.2d 1478 (en banc) (1st Cir. 1989); *Cano* v. *Aponte Roque*, 878 F.2d 1 (1st Cir. 1989); *Cordero* v. *DeJesus-Mendez*, 867 F.2d 1 (1st Cir. 1989); *Rodriguez Burgos* v. *Electric Energy Authority*, 853 F.2d 31 (1st Cir. 1988); *Estrada Izquierdo* v. *Aponte Roque*, 850 F.2d 10 (1st Cir. 1988); *Hernandez-Tirado* v. *Arias*, 835 F.2d 377 (1st Cir. 1987); *Morales Morales* v. *Arias*, 834 F.2d 255 (1st Cir. 1987); *Nunez* v. *Izquierdo-Mora*, 834 F.2d 19 (1st Cir. 1987); *Zayas-Rodriguez* v. *Hernandez*, 830 F.2d 1 (1st Cir. 1987); *Vazquez Rios* v. *Hernandez Colon*, 819 F.2d 319 (1st Cir. 1987); *Perez Quintana* v. *Gracia Anselmi*, 817 F.2d 891 (1st Cir. 1987); *Raffucci Alvarado* v. *Zayas*, 816 F.2d 818 (1st Cir. 1987); *Rosado* v. *Zayas*, 813 F.2d 1263 (1st Cir. 1987); *Mendez-Palou* v. *Roberts-Betancourt*, 813 F.2d 1255 (1st Cir. 1987); *Monge-Vazquez* v. *Roberts-Betancourt*, 813 F.2d 22 (1st Cir. 1987); *Cheveras Pacheco* v. *Rivera Gonzalez*, 809 F.2d 125 (1st Cir. 1987); *Rodriguez Rodriguez* v. *Munoz Munoz*, 808 F.2d 138 (1st Cir. 1986); *Jimenez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (en banc); *De-Choudens* v. *Government Development Bank of Puerto Rico*, 801 F.2d 5 (1st Cir. 1986) (en banc); *De Abadia* v. *Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986).

I. *Facts* [2]

In November 1984, the Popular Democratic Party (PDP) won the gubernatorial election in Puerto Rico. Defendant Awilda Aponte Roque, a member of the PDP, was then named Secretary of the Department of Public Education. Aponte in turn named defendant Maria P. Scott as director of the Department's Humacao Region. Plaintiffs, all members of the New Progressive Party (NPP), are officials in the Humacao Region and have been "career" employees with the Department for more than twenty years.[3]

Plaintiffs' action under 28 U.S.C. § 1983 alleges that political discrimination resulted in a drastic change and reduction of their duties, and that this violated the First and Fourteenth Amendments of the Constitution. The relevant testimony in their jury-waived trial may be summarized as follows. Defendant Scott assumed office on January 14, 1985. Within four days, without having met with any of the plaintiffs, including Maria Agosto de Feliciano, her immediate subordinate, and without having developed any clear reorganization plan, she issued a memorandum setting forth new "guidelines for the Department." These removed responsibilities from plaintiffs, and required plaintiffs to obtain approval for their work from other employees who were PDP members and who previously had held positions subordinate to plaintiffs. Phone calls, mimeographing, photocopying and typing were to be similarly authorized.

[2] We detail here the facts in *Agosto de Feliciano* v. *Aponte Roque*, No. 86-1300, to provide context for the legal issues we decide herein. We see no need to present as well the factual background of *Torres Hernandez* v. *Padilla*, Nos. 86-1643 and 86-1644, which involves only one additional plaintiff.

[3] A career employee under Puerto Rico's civil service personnel system is selected strictly on merit and can be removed only for cause. Puerto Rico Public Service Personnel Act of 1975, 3 L.P.R.A. §§ 1301, 1331-1338. In contrast, confidential employees under the Act are of "free selection and removal," and are those who "intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency . . . ." *Id.* at §§ 1350 and 1350(4).

According to several plaintiffs, defendant Scott explained that her actions stemmed from the recent political change. When plaintiffs wished to meet with her to discuss their problems, she insisted upon including her "confidence group" — PDP members who previously had been subordinate to plaintiffs. Plaintiffs twice complained by letter to defendant Aponte of being deprived of some of their functions, which had been reassigned to lower level personnel, and of their inability to communicate with defendant Scott. Aponte's only response was to indicate that she was referring the matter to Scott.

We now summarize the evidence with regard to the specific changes in the plaintiffs' responsibilities:

Maria Agosto de Feliciano. Her prior job description consisted of some 26 responsibilities. Although the list appears somewhat inflated by bureaucratic jargon, it is nonetheless obvious that as the Assistant Regional Director she had varied supervisory and other responsibilities, including representation of the regional director in all activities in which the director is unable to participate. She also was in charge of the office in the regional director's absence. After defendant Scott's arrival on the scene, Agosto's duties were confined to the special education program and to signing checks. She no longer oversaw general supervisors.

Virginia Diaz Diaz. She served as liaison between the Department of Public Education and private schools, coordinated the teaching practice program in the Project School without grades, and directed a regionwide commit-

tee on school organizations. After defendant Scott's arrival, she continued to work with schools without grades and private schools, but no longer directed the school organizations committee. In addition, she had to ask defendant Scott or Scott's secretary for permission to use a telephone, to make photocopies, or to have typing done.

Luz Camacho de Ortiz. Her prior list of responsibilities included some 23 items, ranging from surveying needs, developing work plans, and evaluating curricula and training, to managing vocational education and supervising student organizations. After defendant Scott's arrival, she was deprived of her former supervisory duties and had the sole functions of working in connection with talented students and of supervising an elementary school science program for which she had inadequate background.

Vincente Vasquez Castro. His prior job description included 21 items of rather broad responsibilities in the areas of vocational education and student services. Evaluation of personnel, curriculum revision, budget distribution, development of new techniques, and oversight of programs relating to school needs, transportation, and scholarship were some of them. After defendant Scott's arrival, he no longer supervised; such responsibilities were assigned to a former subordinate, a PDP member. Vasquez's sole function was partial responsibility for the school transportation program.[4]

Defendants advanced several arguments to the district court. They challenged the contention that the changes in plaintiffs' duties were politically motivated, asserting that their knowledge of plaintiffs' political affiliation was evidenced only by plaintiffs' self-serving testimony. Defendant Scott testified that the jobs held by plaintiffs had always been subject to reshaping and reassignment of duties by her predecessors, that plaintiffs' remaining responsibilities were indeed substantial ones, and that she was in the midst of a process of determining the needs of her region and, when a complete analysis had been made, she would begin "adding functions pertinent to the position[s]."

[4] The fifth plaintiff, Vega Diaz, was found by the district court not to have established in sufficient detail the tasks assigned to him before and after the change of government and, therefore, "failed to prove that there had been substantial changes in his tasks . . . or that the same were changed to tasks of lesser category." No appeal was taken from this holding.

The district court held that plaintiffs had established a prima facie case of political discrimination and that the defendants had not submitted a "credible justification." It granted an injunction reinstating plaintiffs to their former duties. It observed that neither defendant had raised the defense of qualified immunity, and awarded, against both defendants, compensatory damages for emotional and mental distress in the amount of $60,000 for each plaintiff, and punitive damages in the same amount for each plaintiff.

Defendants filed this appeal, making the following arguments: 1) plaintiffs have no cause of action under the First or Fourteenth Amendments; 2) defendants are entitled to qualified immunity; 3) the district court's findings of fact are erroneous; 4) the award of damages is excessive; and 5) the injunctive relief is overly broad.

II. *A Legal Standard for Adjudicating Allegedly Partisan Reallocation of Duties and Changes in Working Conditions of Civil Service Employees*

A.

The difficulties in determining whether a government employee is protected from a politically motivated dis-

charge are considerable. *See* cases listed in note 1. As the facts of *Agosto de Feliciano* v. *Aponte Roque* illustrate all too well, however, the difficulties facing courts in cases involving employer action less final and definitive than dismissal are potentially enormous. They arise from the need to sift out the chaff of minor irritants and frustrations from the wheat of truly significant adverse actions.

The major issues presented in these cases are whether and under what circumstances public employer action short of dismissal, adversely affecting a career employee, based solely on the latter's political affiliation, should be held to violate the First Amendment right of free association. By definition, we no longer have the bright line threshold of dismissal present in *Elrod* and *Branti*. Our search for workable standards promises to be difficult. Indeed, Justice Powell in his dissenting opinion in *Elrod* speculated that "[t]he difficulty of formulating standards might pose a bar to judicial review of some patronage practices not before us." 427 U.S. at 377 n.1.

Other circuits have resolved these issues in widely diverging manners. The Second and Third Circuits have adopted a rather wide-open approach. *See Lieberman* v. *Reisman*, 857 F.2d 896, 900 (2d Cir. 1988) ("Whenever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns."); *Bennis* v. *Gable*, 823 F.2d 723, 731 (3d Cir. 1987) ("the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech"). *See also* Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chi. L. Rev. 181 (1982) (arguing that all politically inspired adverse personnel actions, whether or not equivalent in severity to dismissal, are

unconstitutional). The Seventh and Fourth Circuits have been more restrictive. *See Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 949-51 (7th Cir. 1989) (en banc), *cert. granted*, 58 U.S.L.W. 3185 (U.S. Oct. 3, 1989) (to be actionable, adverse personnel moves must amount to the "substantial equivalent [of] a dismissal"); *Delong* v. *United States*, 621 F.2d 618, 623-24 (4th Cir. 1980) (similar). *But see Pieczynski* v. *Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989) ("Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs.")

In any event, our starting point must be *Elrod* and *Branti*. We discern several teachings, either explicit or implicit, in those decisions. First, the holdings were explicitly confined to patronage dismissal cases. Justice Stewart, his concurrence necessary to form a majority in *Elrod*, made it clear that "the broad contours of the so-called patronage system, with all its variations and permutations," were not being considered. 427 U.S. at 374. We therefore realize that, in dealing with something less definitive than dismissals, we enter a field yet unploughed by the Court.

Second, notwithstanding the limited scope of the Court's holdings, they imply applicability of the First Amendment protection to some patronage employment decisions short of dismissal. We say this because of the Court's references to "political belief and association" as being "the core of those activities protected by the First Amendment." *See, e.g., Elrod*, 427 U.S. at 356. Expanding on this theme, the plurality in *Elrod* quotes, with the endorsement of Justice Stewart, the sweeping language of *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972): " '[I]f the government could deny a benefit to a person because of

his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.' " 427 U.S. at 359, 375. This language also found favor with the majority in *Branti*. 445 U.S. at 515. In addition, we attach some significance to the fact that the Court in *Branti* saw fit to quote the district court's explanation, accompanying its injunction prohibiting termination of plaintiff's employment, that "[m]ere payment of plaintiff's salary will not constitute full compliance...," 445 U.S. at 509 n.3.

Third, our resolution of the basic questions in these cases must recognize that there are First Amendment interests on both sides. As the Court in *Elrod* stated, "It is apparent that at bottom we are required to engage in the resolution of conflicting interests under the First Amendment." 427 U.S. at 371. The First Amendment interest at stake on the government's side that seemed to weigh most heavily in the Court's analysis was "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate," *id*. at 367, or alternatively, the "need to insure that policies which the electorate has sanctioned are effectively implemented," *id* at 372. Although this interest is not sufficient "to validate patronage wholesale," it is "not without force." *Id*. at 367.

B.

What we draw from these teachings is that our task is to devise a standard for evaluating employee burdens that protects against at least some politically motivated actions short of discharge, but that also gives due breadth to the government's interest in the effective implementation of its policies. In searching for such a standard, we first

consider what level of generality is most fitting. The choices, broadly speaking, are whether to apply categorical definitions as in *Elrod* and *Branti*,[5] or to engage in very fact-specific and ad hoc analysis of the interests of an employee, the extent to which those interests have been adversely affected by a government decision, and the particular needs of government. The latter approach has been adopted by the Supreme Court in cases where employees have been dismissed in retaliation for speech activity. *See, e.g., Rankin* v. *McPherson*, 483 U.S. 378 (1987); *Connick* v. *Myers*, 461 U.S. 138 (1983); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). This approach is well adapted to cases involving expression by public employees, for the form, content, manner, time, and place of expression can be definitely varied, as can be the circumstances bearing on the employer's legitimate needs. *See* Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 Colum. L. Rev. 558, 567 (1985).

We believe a categorical approach is appropriate here, although it is not so obvious a choice as in *Elrod* and *Branti*. In those cases, there were fewer variables; the employer action at issue always was a discharge. In the cases we now consider, however, we face a virtually infinite number of possible employer actions that will fall along a wide spectrum of severity. The employer's interest

[5] Categorical analysis involves development of a general standard separating protected from unprotected activity that can be applied to every case. In *Elrod* and *Branti*, the Court established that employees whose jobs were categorized as policymaking, confidential, or communicative were not protected from political discharge, so long as party affiliation is an appropriate requirement for the position. *See Elrod*, 427 U.S. at 367-68, 375; *Branti*, 445 U.S. at 517-18; *Jimenez Fuentes*, 807 F.2d at 242. The Court also assumed that discharges of such individuals would be justified in light of the new administration's interests, and did not require ad hoc scrutiny of the weight of the government's interest in any particular case.

in taking politically motivated action also will vary significantly because the jobs at issue will range from those falling just outside the core political positions excepted from the *Elrod-Branti* protection to those with far more remote links to the political process.[6] We could, therefore, attempt to weigh the impact on the employee against the government's interest in each case, constructing a kind of sliding scale of protection from political harassment.

We decline to do so not only because such a procedure seems overwhelming in light of the many possible combinations of factors, but also because we believe there are strong reasons for adopting a categorical cutoff point of severity of harm below which actions simply should not be considered a constitutionally significant burden on the employee's political association right.[7]

First, if the threshold for an actionable constitutional violation were low, we believe employees would too often resort to litigation when the employer's action was actually apolitical in nature. All employees, regardless of politics, may face a variety of lesser aggravations and inconveniences in the workplace, and a common

[6] As did the Supreme Court in *Elrod* and *Branti*, we assume here that the employee's interest in free political association and the administration's interest in the effective implementation of the electorate's preferred political policies are substantial. *Elrod* and *Branti* tell us, however, that when the administration's interest is at its highest point, it outweighs the individual's right to be free from political pressure. Thus, an employee in a policymaking position may be discharged solely on the basis of political affiliation.

[7] Our reference to a "categorical" approach does not mean that the trial court would be freed from a detailed inquiry into what happened to the employee and why the government took the actions it did. Rather, once the court has found the facts, it will look at whether the employee has met the standard we set today for proving an actionable First Amendment violation. This is categorical in the sense that the factfinder will be required to apply the standard and will not be free simply to balance the interests at stake in the individual case.

catalogue of such non-political grievances — such as feelings of insufficient autonomy, complaints about unpleasant new duties, or restricted access to the telephone — could all too easily, and incorrectly, be ascribed to partisan political motivation. Although the government employer could be expected to prevail in cases where there was no political motivation for the actions, we should discourage employees from drawing the courts into the day-to-day operations of government.

Second, unlike in *Rankin*, *Connick* and *Pickering*, where the public employer's asserted interest was in efficiency, the government's competing interest in a political patronage case also is based in the First Amendment. *See Elrod*, 427 U.S. at 371 (recognizing administration's interest in the effective implementation of political policies that presumably were sanctioned by the electorate). This interest would be undervalued if administrations could be forced to defend in court every decision to adopt new procedures, to create new organizational structures, and to reallocate functions. Thus, again, while the government could be expected to prevail when it takes actions in furtherance of its interest, and should lose when the only motive is to reward or punish political friends or foes, we should seek a method for resolving valid complaints that will avoid excessive court intervention by giving some breathing room to legitimate efforts to make good on promises to the electorate.

Third, we believe that even some politically motivated interactions between high-level policymakers and protected civil service employees should not trigger a constitutional cause of action. These less serious occurrences — social preference or pressure, nuances affecting status and prestige, and articulated or indirectly manifested slurs and gibes — may be an all too real by-

product of our long-standing organization of political life into two or more parties. *See Bart* v. *Telford*, 677 F.2d 622, 625 (7th Cir. 1982). We believe it appropriate to require the citizen who believes and affiliates with a political party to develop a suitably thick skin to withstand the rigors of our societal, often highly politicized, life.

In short, these factors suggest that insubstantial changes in an employee's work conditions and responsibilities, even when politically motivated, either would not reasonably chill the employee's exercise of the right to free political association, or would cause a level of burden that is almost certainly outweighed by the government's need to protect its own interest in implementing new policies. We therefore believe our task is to develop a general standard that would at the same time protect the rights of political belief and association against real and substantial assaults, and yet also protect a government from a legal battle over every move it makes to implement its policies. We believe this balance is reached, and a cause of action for violation of the employee's free association right therefore stated, only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations in favor of the prevailing party.

C.

We thus turn to our primary task, the creation of a workable standard for recognizing a violation of a civil servant's freedom of association. We have pondered and labored at length in an effort to define this constitutional violation in a way that will neither unduly strain governments with harassing lawsuits nor unduly discourage employees with formidable complaints from asserting their rights. We have found that no simple catch phrase

suffices to meet these dual goals. In particular, we have rejected as unhelpful the "constructive discharge" or "tantamount to dismissal" formula adopted by at least two other circuits. *See Rutan*, 868 F.2d at 949-51; *Delong*, 621 F.2d at 623-24. If we used such a standard, we would be holding that an employee's First Amendment right is significantly burdened only when he or she has, in effect, been fired for the exercise of that right. But comparing what happened to an employee in this context with the repercussions of discharge risks undervaluing the employee's right. Pension rights, seniority, fringe benefits, and the security represented by government employment all may be retained in these cases — as they were in the instant one — because the plaintiffs nominally may continue to hold the same jobs they previously had held. Moreover, many of the employees involved in such cases would be likely to endure severe hardship before contemplating resignation. In the case of a senior civil servant, for example, mobility is likely to be extremely limited and only rather cataclysmic changes could reasonably induce one to quit. To link a constitutional violation to a finding of "constructive discharge," or to conditions "tantamount to dismissal," may therefore allow an impermissibly high burden on the free exercise of the political association right. Thus, we think it ill-advised to adopt this short-hand method of describing the burden that we believe is sufficient to state a cause of action for violation of an employee's free association right.

We also have rejected as insufficiently revealing the tag "constructive demotion," although we note that the results of the standard we are about to describe would, in many respects, mirror those of a constructive demotion analysis. We nevertheless decline to adopt the short-hand phrase because when a bureaucrat is denied respon-

sibilities and perquisites appropriate to the position occupied, it does not necessarily mean that he or she has been accorded those appropriate to a lower level. In our view, a "constructive demotion" inquiry would simply obfuscate matters by raising the distracting question of the level to which the plaintiff has descended.[8]

We have, however, found instructive a precedent of our own that is repeatedly cited for its discussion of "constructive discharge," *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114 (1977). That case has guided us not by its "tantamount to dismissal" standard but by two aspects of its methodology: first, the technique of canvassing specific injuries to evaluate the severity of the change wrought in the plaintiff's employment position, and second, judging the change against a standard that asks whether the new work situation is "unreasonably inferior to his prior position." In *Alicea Rosado*, we found no constructive discharge because the duties of the transferred plaintiff remained appropriate for his rank, even though he was no longer in charge of an office. Although this meant a "limited blow to [his] pride," 562 F.2d at 119, and the transfer would have increased his unreimbursed commuting costs, we concluded that "[a] more drastic reduction in the quality of working conditions [would be] needed," *id.* at 120, to constitute a constructive discharge.

We conclude that a similar technique, and a similar standard of severity of harm, are appropriate here, where our goal is to determine whether the new work conditions would place substantial pressure on even one of thick skin to conform to the prevailing political view. This level of

[8] We have treated outright demotions, which involve reductions in pay and official rank, as equivalent to discharges. *See, e.g., Gierbolini Colon* v. *Aponte Roque*, 848 F.2d 331, 333 & n.2 (1st Cir. 1988).

burden is reached, we believe, when the employer's challenged actions result in a work situation "unreasonably inferior" to the norm for the position. To determine whether such a reduction has occurred — in other words, to evaluate whether the changes were sufficiently severe to warrant the "unreasonably inferior" description — the factfinder should canvass the specific ways in which the plaintiff's job has changed. Because we recognize that the "unreasonably inferior" standard is not self-defining, and could be subject to widely varying interpretations, we offer below some guidelines for judging severity. These are, of course, not prescriptive, but are designed to demonstrate the severity of change necessary to constitute a violation. We are well aware of the impossibility of devising detailed prescriptions that would cover future cases. We therefore caution that the suggested results in the following illustrations might well be altered by even slight factual variations.

1. An employee who has lost merely the "perks" of this position — for example, the best office or secretary in the agency, unlimited telephone access or unusually minimal oversight — would not meet the "unreasonably inferior" standard.

2. An employee whose job has been substantially narrowed — perhaps reduced from manager of five departments to two — but who retains supervisory authority over matters of comparable significance to those taken away would not meet the "unreasonably inferior" standard.

3. An employee who previously had predominantly exciting and responsible work and who was left with only a few routine and technical assignments could be found to meet the standard

so long as his prior duties reflected the usual nature of his position rather than his prior high status as a member of the then-prevailing party. For example, if an assistant to the director of an agency typically has no supervisory authority, but the potential plaintiff who is in that job had supervisory status under the last director *because he was a political ally of that director* or because he had some other idiosyncratic *nonpolitical* relationship (say, friendship or "golfing buddy" status) with his superior, a reduction of the employee's role to the norm would not give rise to a violation. On the other hand, if the assistant to the director traditionally has run the office in the director's absence, and the new director now assigns this task — and others of responsibility — to someone who is the plaintiff's subordinate, a factfinder would be entitled to term the new job conditions "unreasonably inferior."

4. An employee whose job functions remain largely the same, but who is excluded from policymaking sessions that he or she once attended would not meet the "reasonably inferior" standard. Such a person, whose duties are not politically sensitive enough to allow a patronage dismissal, may nevertheless as a party confidante have been invited to contribute ideas and advice to those in policymaking positions. The new administration need not extend similar invitations to those who do not share its political outlook.

5. An employee who had been a supervisor and had worked independently in designing the projects necessary to carry out her duties and

who lost only the freedom to work independently — instead being required to report regularly on her work — would not meet the standard. Similarly, if the employee lost her supervisory role but continued to work independently on projects of significance, she would be unlikely to meet the standard unless the supervisory part of her job had been its defining characteristic.

If, however, that same employee lost both her supervisory status and her independence, in all likelihood the factfinder would be entitled to conclude that she met the standard. The decision would turn, however, on such factors as whether the supervisory role had been a primary part of her job, whether the duties she retained were challenging and significant, and whether new and inferior working conditions accompanied the change in duties (e.g., lost access to telephone and photocopier, poorer office accoutrements, worse hours).

6. An employee who is given one or two short-term assignments that are below his rank probably would not meet the standard of severity. In general, an employee must show a permanent, or at least sustained, worsening of conditions to reach the threshold of constitutional injury. If, however, a temporary change in duties is so inappropriate as to be demeaning and persists for longer than a week or two, the severity threshold might be met.

7. An employee who retains her job duties but who is criticized harshly and on a nearly daily basis, never provided guidance on how to improve, transferred to an undesirable office space

(e.g., without ventilation or in a distant location from the remainder of the office staff), and whose requests for assistance are spurned would meet the severity level.

Our standard incorporates not only the substantive "unreasonably inferior" criterion as we have attempted to define and illustrate it, but also the procedural requirement that a plaintiff establish a change in conditions sufficiently severe to meet this high standard by clear and convincing evidence. We do not subject proof of an employer's political motivation to this more rigorous burden requirement because we feel that political animus too often would be difficult to identify by proof beyond a preponderance. Setting a more demanding requirement for the political motive requirement would, we feel, impermissibly chill this kind of First Amendment right of an individual. But proof of changed conditions is not so subject to camouflage, and requiring that it be established beyond a slight tilt in the believed testimony seems to us consistent with the First Amendment interest of the governmental employer. *See Addington* v. *Texas*, 441 U.S. 418, 424 (1979) ("clear and convincing" standard has been used to protect notably important interests in civil cases). *See also Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 925-26 (1st Cir. 1988) (adopting "clear and convincing" standard for proof that wrongfully concealed evidence was inconsequential).

While recognizing the risk of too narrowly describing the task at hand, we suggest that the factfinder's responsibility, in brief, is to determine whether the employee has retained duties, perquisites and a working environment appropriate for his or her rank and title. In some instances, the factfinder will be able to look primarily at the

history of the job at issue to determine whether the employee's new role is unreasonably inferior to what the job is supposed to be. In other cases, however, there may be no stable prior job history to serve as a standard, and the factfinder will be able to examine only the change in the particular employee's working conditions to determine whether the "new" job is unreasonably inferior to the one she previously had. In every case, the burden will be on the employee to establish this fact through clear and convincing evidence.

D.

The case is not over, of course, even when a factfinder determines that the harm suffered by an employee is sufficiently severe to meet our standard. The employee still must persuade the factfinder by a preponderance of the evidence that the diminution in duties was motivated by discrimination on the basis of political affiliation.[9] Under the formula used in political discharge cases, an employer then may seek to establish by a preponderance of the evidence that the changes would have been made *regardless of* political affiliation. *See Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *Cordero* v. *DeJesus Mendez*, 867 F.2d 1, 5 (1st Cir. 1989); *Kercado Melendez* v. *Aponte Roque*, 829 F.2d 255, 264 (1st Cir. 1987). Examples of such defenses would be a showing that plaintiff's performance had been so unsatisfactory that assignment to less demanding duties was indicated, a

[9] The question of political motivation could be resolved before the issue of the severity of the harm. For example, in instances in which discovery shows that the defendants' actions obviously were motivated by lawful concerns, it is likely that a district court faced with a defense motion for summary judgment would choose to dispose of the case on that ground rather than to delve into the facts concerning the change in duties.

showing that elimination of an employee's most important projects resulted primarily from unavoidable budget cuts, or a showing that *most* employees within the relevant unit, regardless of political affiliation, experienced a reduction in duties as part of a personnel expansion and reallocation of responsibilities.

One defense available to the government deserves more sustained attention. This is what we shall call the "changeover" defense. It refers to a new administration's claim that challenged actions taken reasonably soon after the "changeover" in power were designed to advance its First Amendment-related interest in implementing its policies. This defense has two aspects. The first recognizes the obvious fact of life that many changes in government can be expected early in a new administration's tenure. In order to best accomplish its policy goals, a new administration may substantially reorganize the structure of one or more departments, it may readjust departmental priorities, or it may initiate entirely new procedures for carrying out its functions. The changeover in government is thus likely to produce substantial alterations in certain employee's jobs not because those employees are members of the outgoing party but because the incoming party, *as a matter of policy*, does not view those jobs to be important. We believe an incoming administration must be given ample room to effect this sort of change without the fear of triggering a multitude of lawsuits by employees whose jobs have changed. Therefore, we believe the factfinder should give some deference to a new government's explanation of how changes made shortly after it assumed power fit into its overall policy objectives. The government would retain the burden of proof on this issue, although its burden would be lightened by the deference given to it.[10]

The second aspect of the "changeover defense" is more sensitive because it required a modification of the traditional *Mt. Healthy* formula. Rather than requiring the government to state non-political reasons for its actions, this prong assumes that the new administration may, at times, feel the need to assign duties deemed especially critical to its political philosophy to employees who share that philosophy. Such employees may be members of the administration's own party. This shift in duties *based on* political affiliation could be proper where the employer can show a reasonable basis for believing that such an employee would likely be more helpful in implementing the new policies than an employee who is a member of an opposing political party. Although in such cases we are assuming that the cumulative duties of the employee who lost responsibility do not fit the *Elrod-Branti* exceptions, and that the employee therefore would be protected from political *discharge*, it may be that he is not protected from losing *certain* job duties that are politically sensitive within the new administration's framework for government. On this prong, as well, the factfinder should give

[10] We add this important caveat: an administration ought not to be deprived of a "reorganization" defense simply because it took place at a relatively late point in its term of office. Some reforms and reorganizations may be much more complex than others and require much more investigation, analysis and preparatory drafting. And some ideas for restructuring may simply have surfaced later in good faith. We see no need to give the government unusual deference when reviewing late-blooming changes. It should be easy enough for a new administration to defend legitimate reorganizations that come late in its term since such changes are more likely to be documented, and less likely to be politically motivated, than changes made when a new administration first comes to power.

some deference to the government's explanation of its needs.[11]

Deference to the government's explanation of its actions does not mean abdicating the responsibility to determine whether the new administration's changes were in fact made to further the effective implementation of its policies. A plaintiff always must be given the opportunity to demonstrate that the government's asserted justification is simply a pretext. In evaluating the changeover defense, the factfinder should take into account, *inter alia*, whether the actions occurred precipitately or after some opportunity for appraisal,[12] whether they seem connected with previously announced goals, and whether they flowed from an organizational or procedural study. In cases implicating the second prong of the "changeover defense", the factfinder must look specifically at the duties in question to determine whether they concern politically sensitive matters.

Thus, drastic changes in job duties and conditions occurring early in the life of an administration may not be made entirely free of potential constitutional liability. Our

[11] A government defense based on policy needs presents another opportunity for ad hoc balancing. We could decide on a case-by-case basis whether the government's need to take an employee action based on political affiliation is outweighed by the burden on the employee. We again choose a formulaic approach: if the government demonstrates that there is some policy justification for internal reshuffling of duties, in view of its mandate as a democratically elected administration, we will refrain from any further balancing. This approach is consistent both with *Elrod* and *Branti* and with our view that governments must have some breathing room to make good on promises to the electorate. The employee, of course, must be given the opportunity to refute the government's assertion that policy concerns motivated the disputed action.

[12] For example, changes made within days of a new administration's ascent to power ordinarily would be more likely to reflect an improper political housecleaning than would changes made months later, after the new officials have had a chance to evaluate how to reorganize their departments to best meet their policy goals.

policy of deference to the government's explanations, however, should allow officials to take *legitimate* actions toward implementing their policies without undue fear of liability. So long as the government is able to provide a substantive reason for its decision that is supported by the facts in the record, the government will be able to justify its actions with the changeover defense.[13]

E.

We do not believe our standard will open the door to a flood of new lawsuits. The severity of the harm necessary to state a cause of action and the defenses available to government defendants should discourage those with petty complaints. Moreover, many cases may be ready for decision at the summary judgment stage since, in our view, conversations and exhibitions of attitude are far less relevant than evidence as to working conditions and responsibilities. Judges should encourage the submission of sufficient documentation to enable such a resolution to be made as early and as often as possible. And to the extent that litigants or their lawyers make conclusory claims

[13] In suggesting some deference to a new administration's explanation of how its program was aided by the changes it made shortly after assuming power, we do not mean to set out a fixed criterion for every case. What we face in the instant case and its companion is a restructuring of important jobs and reassignment of duties to political confidants, the kind of action frequently sought to be justified on policy grounds, particularly right after a new government assumes power. We do not consider here decisions with a more individualized impact — decisions in which the policy justification is more difficult to perceive because the adverse action against a political opponent takes place with no discernible parallel change in favor of a political colleague. Such actions could include a transfer to a distant state, *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980) or a denial of a scheduled promotion or salary increase, *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984); *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. 1981); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980). Such decisions arguably present such a divergence from normal administrative practice that assertions of policy justification warrant particular skepticism rather than deference. We express no views on such cases at this time.

without "reasonable inquiry" to assure that claims are "well grounded in fact" and "warranted by... law," Fed. R. Civ. P. 11, the district courts have ample power to forestall abuses. *See id. See generally Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988).

Finally, although district court findings of fact will stand unless clearly erroneous,[14] their measurement against the general standards we have set forth will be reviewed by us as a question of law: whether the politically motivated change in an employee's work conditions imposes a substantial burden on the employee's right to free association that is not outweighed by the government's interest in implementing effectively its policies. Our own effort will be directed at striking a balance which will be sensitive to both the rights of civil servants to their political beliefs and associations and to the rights of administrations in power to effectuate their perceived mandates from the electorate. We shall also remain keenly sensitive to the danger that courts be seized upon as arbiters of petty grievances. We recognize the existence of a vast mine field and the possibility that subsequent clearer perception of the hazards may well cause us to refine or change our standards.

III. *Application of Standard*

We conclude that the district court should have the opportunity in the first instance to evaluate the plaintiffs' complaints in light of the standard we announce today. That court may feel able to make judgments based on the evidence it has heard already, or it may choose to hear

[14] We reject defendants' urging that we review the facts de novo as in cases involving free speech. *See Figueroa* v. *Aponte Roque*, 864 F.2d 947, 949 n.3 (1st Cir. 1989).

additional evidence on factors the parties did not previously deem relevant in determining whether an individual has been subjected to unreasonably inferior working conditions. For example, the parties may not have developed evidence concerning the duties and perquisites appropriate for a given position, instead directing their energies toward showing the differences between an employee's old job duties and the new ones. These two inquiries may not lead to the same result.

We therefore remand these cases so that the district court may reconsider its judgments in light of the standard we have developed for identifying a violation of a government employee's constitutional right of free political association. Our disposition makes it unnecessary to consider at this time the other issues raised by the parties.

The judgments of the district court are vacated, and the cases are remanded for further proceedings consistent with this opinion.

Concurrence follows.

CAMPBELL, *Chief Judge* (Concurring). I join in Judge Coffin's opinion because his analysis seems the most consistent with what the Supreme Court has said to date. The Court will soon, however, be studying for the first time the very sort of matter now before us, *see Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 949-51 (7th Cir. 1989) (en banc), *cert. granted*, 58 U.S.L.W. 3185 (U.S. Oct. 3, 1989); and I hope that, upon further analysis, the Court will decide *against* allowing state employees to sue for job changes that fall short of actual or constructive discharges.

Judge Breyer has brilliantly highlighted the dangers of our present position. Whatever good may occasionally result from allowing recovery for deprivation of job responsibilities and perks, is outweighed by the pressures the existence of such an action will impose upon the government. The threat of such lawsuits could deter administrators from making needed reorganizations and personnel shifts.

Judge Coffin does as well as can be done in setting out criteria to separate meritorious from spurious claims. But the intricacy of the necessary analysis makes it difficult to predict outcomes. Many situations will involve uncertainty until resolved in court. The only sure way for an administrator to avoid liability will be to avoid changing the status quo. Thus the voters' mandate for change may go unheeded. In my view, the Constitution should never be read as providing for this kind of relief.

Torres-Hernandez exemplifies a scenario to be expected in many of these cases. I completely share Judge Breyer's disbelief that recovery is a serious possibility here. Nonetheless, for the time being, I join my colleagues in vacating and remanding, thus leaving that case alive for the moment at least. I do so solely in the interests

of uniformity and because I hesitate to cut plaintiff off until the Supreme Court has had time to establish the ultimate standard.

Concurrence and Dissent follows.

BREYER, *Circuit Judge*, (concurring and dissenting).

I.

Concurrence

The majority holds that the First Amendment, as interpreted by the Supreme Court in *Elrod* and *Branti*, protects a government employee (in a "nonpolitical" position) from demotion to an "unreasonably inferior" work status because of membership in a particular political party. I concur in this holding. The *Elrod/Branti* text that the majority quotes, see pp. 9-11, *supra*, indicates that the opinions' rationale is not limited to discharges; and, it is difficult to see how the First Amendment can prohibit politically motivated discharge, yet not prohibit politically motivated demotions or other personnel actions that are often just as serious. Thus I cannot say the majority's reading of *Elrod* and *Branti* is wrong.

Moreover, the majority's opinion fully recognizes that "political retaliation" cases, such as those before us, embody not one, but two sets of potentially conflicting interests. On the one hand, the First Amendment protects a goverment employee's association with others in a political party. On the other hand, a major reason the Constitution protects associational interests is so that individuals can join together in working to elect a government that will create practical programs of administration to carry

out the policies they advocate. Thus when courts apply the First Amendment to protect political associational interests of government employees, they must recognize *not only* that the lack of *any* protection can open the door to unwarranted, politically based victimization, but also that too much judicial intervention may unjustifiably interfere with the electorate's ability to see its political aims translated into action.

The majority has made a fine effort to reconcile these competing interests. On the one hand, it permits suits designed to show a serious, politically motivated "demotion." On the other, it seeks to prevent juries from simply supplanting civil service commissions — by insisting that the relevant harm be severe, that it be shown by clear and convincing evidence, and that it correspond roughly to the types of significant harm that the court illustrates with examples. To maintain adequate flexibility for an administration, particularly a new administration, to implement new policies, the court constructs the "changeover" defenses, and creates rules of "deference" for the factfinder, whether judge or jury. In short, the judicial machinery is carefully calibrated to meet competing constitutional needs.

Yet, I must confess to doubts. For one thing, will these standards prove sufficient to protect the administrative (and, ultimately, the electorally-based, democratic) need for flexibility? Suppose, as in 1971, a new Federal Trade Commission chairman wished to reinvigorate a moribund agency. Suppose the new chief wished to change the responsibilities of top-level civil servants, bringing those more likely sympathetic to new policies closer to the center of power. Further, suppose that a higher percentage of those persons whom he wished to entrust with increased responsibility, persons whom he

believed more sympathetic to his policies, belonged to the newly elected political party. Will not many of those replaced find that their job responsibilities have "been substantially narrowed," leaving them without "supervisory authority over matters of comparable significance," p. 19, *supra*, or that their (nonpolitical) jobs, which previously embodied "exciting and responsible work," now involve "only a few routine and technical assignments?" *Id*. Will it be possible to *prove in court* that the new, replacement group of "top lieutenants" is more capable that the old? Might not the new chief have based changes in responsibility in part upon what he has heard informally, or even sensed, including matters which (because they are impressionistic or even derogatory) other administrators cannot or will not testify about in a court? *Compare* American Bar Association, *Report of the Commission to Study the Federal Trade Commission* (1969) (detailing need for revitalization at FTC) *with* President's Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* ("The Ash Report") (1971) (advocating restructuring of responsibilities to centralize authority in independent agencies).

Of course, the majority has dealt with this problem by allowing the government to defend against a charge of politically motivated acts by demonstrating that the changes were part of a policy initiative, and the majority insists that judge or jury "defer" to that determination. Yet, a plaintiff (a Republican when Democrats are in power, or vice versa) will still win unless "an employer can *show* a reasonable basis for believing that...[the employee to whom plaintiff's responsibilities were shifted] is more likely to help implement the new policies than an employee who is a member of an opposing political party." P. 24, *supra* (emphasis added). Can a department

chief *know* what he will, or will not, be able to *show* (to "establish by a preponderance of the evidence") at some future time *in court*, before a jury, rather than before a more expert civil service board? Without such knowledge, can he act boldly enough to translate the will of an electing majority into workable policy? Will politically appointed department heads, without such knowledge, and fearing damage judgments after court battles, tend to follow the path of least resistance, namely, the status quo? Will the inevitable, serious, and unknown risk of liability contribute to bureaucratic inertia? At a minimum, a new official trying to implement new policies will have to document his reasons for each change of administrative responsibilities and employee transfer, thereby transforming fairly routine administrative changes into changes that the Constitution permits only for "cause," with an accompanying need for legal documentation of that "cause."

For another thing, despite the majority's standards, it may prove difficult to prevent the courts from being swamped with a vast number of plaintiffs complaining of the sorts of personnel actions that a civil service board can more properly and more fairly decide. (For examples of administrative grievance procedures already in place, see 5 U.S.C. § 1206 (authorizing and directing the Special Counsel of the federal Merit Systems Protection Board ("MSPB") to investigate prohibited personnel practices on request); 5 U.S.C. §§ 7512, 7513 (b) - (d), 7701(a), 7702, 7703(a) (1982), § 7543 (1982 & Supp. II 1984) (providing, for all significant adverse actions taken against civil servants, agency notice, hearing or opportunity to answer, appeal to the MSPB, review by the Equal Employment Opportunity Commission in cases involving alleged discrimination, and judicial review of MSPB de-

cisions); P.R. Laws Ann. tit. 3, §§ 1301-1431 (1978 & Supp. 1986) (detailing protections against improper employment practices under the Puerto Rico Public Service Personnel Act).) We know that when the governorship of Puerto Rico changed hands in 1984, about 300 plaintiffs who lost their jobs brought suit, out of about 600 in "trust" or "confidence" positions who were dismissed, in turn out of about 3,700 civil servants who were employed in "trust" or "confidence" positions in a civil service of about 160,000. *See Juarbe Angueira* v. *Arias*, 831 F.2d 11, 14 (1st Cir. 1987). Our decision today opens the door of the federal courts to all those in the civil service, including those towards the bottom of this vast pyramid, who might claim that a significantly adverse personnel action rested on political motives. My experience with those of the 300 "dismissal" cases that have reached this court leaves me uncertain of the abilities of the federal courts, insulated from the political process, to determine which specific jobs in fact are politically sensitive (let alone which "job duties" are "politically sensitive," *see* p. 24, *supra*) and, it has made me aware of the concomitant risk of constitutionally freezing into permanent place the civil service structure of the moment.

Despite these doubts, I join the majority opinion because *Elrod* and *Branti*, in my view, mandate the majority's result. At the same time, these doubts prevent me from joining in the disposition of *Torres Hernandez* v. *Padilla*.

II.
Dissent: Torres Hernandez

A reading of the record in *Torres Hernandez, disbelieving all defense witnesses and believing all that plaintiff says*, leads me to conclude that the most that plaintiff could show is the following:

a. In 1981, the Mayor (PDP) faced a Municipal Assembly dominated by the other party (NPP). He know that the plaintiff was an NPP activist. He was having great difficulty dealing with the Assembly.

b. In March 1981, the Mayor found out that the plaintiff, his chief personnel officer, was having lunch at the City Hall with Municipal Assembly officials, including the Secretary of the Assembly. He told her not to do so.

c. In April 1981, the Mayor met with plaintiff and (in her words) "indicated to [her] that he was tired, that he was fed up with both the PDP and the NPP." Plaintiff added:

In that conversation, or at that meeting that the Mayor and I had in private, and with Your Honor's permission I'm going to use an improper word, he said to me, "Maria Teresa, I'm going to tell you something David [an NPP member] told me: a leader of the Popular Democratic Party, that is himself, is a fool, a sucker, because he thinks Maria Teresa is Popular and Maria Teresa is one of ours."

d. In July 1981 (and again in March 1982), the Mayor was having a hard time getting his budget passed. He again asked plaintiff not to make

regular visits to his political opponents at the Municipal Assembly. He seemed angry.

e. At some point, two "irregular" (positions outside of the permanent civil service classification system) employees in plaintiff's division were dismissed; another (who, according to plaintiff, did not like to work Mondays or Fridays) was transferred. All were members of the NPP. Two others were retained; one of these was PDP, one was NPP. Three others were hired; the record does not show their party affiliation.

f. In February 1983 (*one and one-half years later*), the Mayor hired a special assistant who bossed plaintiff around, gave her a smaller desk, and told her to work on file updating.

g. In May 1983, the Mayor wouldn't let plaintiff go on a planned vacation. He gave as an excuse that she was needed because her assistant was sick. The assistant did not seem very sick. Plaintiff has a nervous breakdown and left work.

h. In January 1984, after recovering from the breakdown, plaintiff returned to work and asked for a relocation (on advice from her doctors). The Mayor sent her to the Health Department where she was given (arguably) menial work, but continued to be paid the same salary she had as a personnel officer. She must have been satisfied, for she has complained, not about this job, but about being transferred back to her old job.

i. She ran into the Mayor one day. He seemed cold and distant. This scared her.

j. In March 1984, the Mayor ordered her back to her old job. He berated her, apparently because her plan to get him a larger payroll check

by lowering his payroll retirement deduction backfired, leaving him with a demand for money from the retirement commission. (Could this be why he was a little cold and distant?) Plaintiff had another breakdown.

I would include, as an illustration of circumstances in which a plaintiff can *not* prevail, the very facts of this case. I would hold that plaintiff has not made out a case of unlawful politically motivated demotion. She fails because the bulk of the evidence she relies upon to prove "political motivation," namely, her lunchtime meetings with NPP officials, are, at best, ambiguous in respect to whether (given the circumstance of her working relationship with the mayor) they constitute activity that the Constitution protects.

To permit a finding of liability and assessment of damages on the basis of these facts would suggest, for example, that a mayor of Chicago could not forbid his personnel officer to hold lunchtime meetings with opposition city council members. It would suggest that the head of the federal Office of Management and Budget, during a time of budget crisis, could not try to control meetings between his top civil servants and the Speaker of the House of Representatives (or his staff). Such a finding would place serious, if not insurmountable, obstacles before a mayor who wishes to run his own personnel office and to overrule a civil servant whom he sees as an obstacle, or who hires a non-civil service staff assistant to help him to supervise the running of the office. It would mean that a mayor must either give full personnel responsibilities to a person he sees as a political activist meeting regularly with his political enemies or build a documented case that will show by a "preponderance of the evidence" in court that there is "cause" for transfer. Indeed, since

the only other evidence of political favoritism in this case consists of the fact that the Mayor *also* dismissed three other employees who were members of the NPP, two of whom held "irregular" positions, the decision also requires the Mayor to document reasons for these decisions (even if those dismissed see no problem), thereby transforming low-ranking irregular jobs into a form of tenured employment. If liability were assessed in this case, the only safe course of action for a newly elected mayor would be to change as few responsibilities as possible, to work with the inherited administrative structures, to accept the most serious limitations on his ability to bring about change. That is why I think the conduct at issue in this particular case is properly governed by civil service rules, not the Constitution of the United States.

For these reasons, while I join the opinion of the majority, I would not remand the case of *Torres Hernandez* v. *Padilla* for reconsideration.

Dissent follows.

TORRUELLA, *Circuit Judge* (Dissenting). Someone once said that a camel is a horse that was designed by a committee, an observation of particular relevance to *en banc* opinions. *See United States* v. *M/V BIG SAM*, 693 F.2d 451, 456 (5th Cir. 1982) (Gee, J. dissenting). The present case is no exception. For the sake of reaching a consensus, the majority compromises principle and further clouds the law in this fundamental area of First Amendment rights. That is too high a price to pay for collegiality.

The majority concludes that some politically discriminatory personnel actions against public employees short of dismissal may constitute a violation of the employee's associational rights under the First Amend-

ment, and thus actionable pursuant to 42 U.S.C. § 1983. This result is hardly remarkable, although the restrictions placed upon this holding by the majority are. This conclusion, minus these severe restrictions, was the same one reached by the panels in both of these appeals back in 1987,[1] as well as that of other circuits since.[2] *E.g.*, *Pieczynski* v. *Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989), *reh'g denied*, 1989 U.S. App. Lexis 10065; *Lieberman* v. *Reisman*, 857 F.2d 896, 900 (2d Cir. 1988); *Bennis* v. *Gable*, 823 F.2d 723, 731 (3d Cir. 1987). *See also* Note, *First Amendment Limitation on Patronage Employment Practices*, 49 U. Chi. L. Rev. 181 (1982); Note, *Republicans Only Need Apply: Patronage Hiring and the First Amendment in Avery v. Jennings*, 71 Minn. L. Rev. 1374 (1987). *Contra*, *Rutan* v. *Republican Party of Illinois*, *supra*; *Delong* v. *United States*, 621 F.2d 618, 623-24 (4th Cir. 1980).

What is remarkable is the myopic reluctance of this Court to fully recognize the associational rights of public employees in non-discharge personnel situations, given the overwhelming evidence that this result is mandated by

[1] *See Torres Hernández* v. *Padilla*, Nos. 86-1643, 86-1644 (1st Cir. June 22, 1987); *Agosto de Feliciano* v. *Aponte Roque*, No. 86-1300 (1st Cir. Aug. 14, 1987).

[2] It should also be noted that many courts have applied this principle to the issue of patronage hiring as well. *See Mazus* v. *Dep't of Trans.*, 629 F.2d 870, 873 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Rosenthal* v. *Rizzo*, 555 F.2d 390, 392 (3d Cir. 1977), *cert. denied*, 434 U.S. 892 (1977); *Indiana State Employees Ass'n* v. *Indiana Republican State Cent. Comm.*, 630 F. Supp. 1194, 1196 (S.D. Ind. 1986); *Torres* v. *Grunkmeyer*, 601 F. Supp. 1043, 1047 (D. Wyo. 1984); *Shakman* v. *Democratic Org.*, 481 F. Supp. 1315, 1327 and n.8 1328 (N.D. Ill. 1979); *McKenna* v. *Fargo*, 451 F. Supp. 1355, 1357 (D. N.J. 1978), *aff'd*, 601 F.2d 575 (1979). *See also Comment, Patronage and the First Amendment After Elrod* v. *Burns*, 78 Colum. L. Rev. 468, 475-76 (1978); *Comment, Political Patronage In Public Contracting*, 51 U. Chi. L. Rev. 518, 527-28 n. 58 (1984). *Contra Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 949-51 (7th Cir. 1989) (en banc), *cert. granted*, 58 U.S.L.W. 3185 (U.S. Oct. 3, 1989).

Branti v. *Finkel*, 445 U.S. 507 (1980), and *Elrod* v. *Burns*, 427 U.S. 347 (1976). This reluctance is evidenced not only by the unusual amount of foot dragging that has preceded reaching a consensus on an issue of minimal complexity, but more pointedly, by the timbre of the majority's opinion. That opinion, which in places more resembles a defense litigation manual than an Article III court decision, throws to the wind all notions of case and controversy resolution. *See ante* at 18-20. Reluctance is also manifested by the unprecedented number and nature of tailor-made stumbling blocks, incantated from thin air and placed in the path of civil rights litigants like a carefully laid legal mine field.

As if those chilling processes were not enough, in the questionable interest of keeping this Court's docket within acceptable levels, *ante* at 26, the majority concludes its arctic discourse by unwarrantedly invoking rules of sanction and review which will undoubtedly intimidate both the bar and the bench. *See ante* at 26-27. All of this is secondary, however, to the fact that the standards created are confusing, unworkable and constitutionally flawed.

As linchpin for its rationale, the majority starts by telling us that "the difficulties facing courts in cases involving [public] employer action less final and definitive than dismissal are potentially enormous." *Ante* at 8. This is, of course, totally irrelevant, but even if it were material, it is not any more difficult, tedious or complex to resolve these political harassment cases than the myriad of other issues routinely decided by courts, particularly in the area of employment practices. Deciding such issues is the daily bread and butter of district and appellate courts. *See Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989). Each day federal courts "sift out the chaff of minor irritants and frustration from the wheat of truly significant

adverse actions," *ante* at 8, in cases involving private employers accused of engaging in discriminatory or harassing actions short of discharge, in scenarios in which the alleged animus is race,[3] age,[4] gender,[5] or grounded on anti-union motivation.[6] Despite the application of these laws to private employers and "the difficulties facing courts" in deciding what is discriminatory or harassing in those situations, private enterprise generally survives, and still manages to pass, with some moderate degree of success, the ultimate litmus test of efficiency: turning a profit. Why should not the *public* employer be held to similar standards as the private employer, particularly when dealing with the protection of core First Amendment rights? The protestation of the majority, that only restrictive application of § 1983 will allow the governmental employer to operate efficiently, is contrary to the above cited experience in private industry, and for that matter, in the public sector as well wherein numerous restrictions on

[3] 42 U.S.C. § 2000e *et seq.*; *Falcón* v. *General Tel. Co. of Southwest*, 626 F.2d 369 (5th Cir.), *reh'g denied*, 631 F.2d 732 (1980).

[4] 29 U.S.C. § 626(e)(1); *E.E.O.C.* v. *Air Line Pilots Ass'n Int'l*, 661 F.2d 90 (8th Cir. 1981).

[5] 42 U.S.C. § 2000e *et seq.*; *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775; *Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980).

[6] 29 U.S.C. § 158(a)(1); *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982).

discrimination and harassment short of discharge are applicable to public employers.[7]

The argument that such restrictions on governmental action somehow nullify the democratic majority vote is equally spurious. The First Amendment, like most of the Bill of Rights, exists to protect minorities from abuses of the majority even when constituted in a democratically elected government. Winning an election is not a license to commit First Amendment abuses. *See Branti* v. *Finkel*, 445 U.S. 507; *Elrod* v. *Burns*, 427 U.S. 347.

As is the case with other standards promoted by this court in the field of political discrimination,[8] the so-called "categorical approach" promoted by the majority establishes a non-standard which is biased in favor of the public employer. The emphasis is in the wrong place. This court appears to be more concerned with "harassing lawsuits," *ante* at 16, than with harassed employees. Furthermore, in establishing a "clear and convincing evidence" standard for plaintiffs to prove "unreasonably inferior" changes in conditions sufficient to find a violation of § 1983, the court engages in action tantamount to judicially amending this legislation. I am unaware of, nor does the majority cite, any case litigated pursuant to § 1983 in which a standard of proof higher than that required in all civil suits (*i.e.*, proof beyond a preponderance of the evidence) has been exacted. *Cf. Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775.

[7] *See, e.g., Limongelli* v. *Postmaster General of the United States*, 707 F.2d 368 (9th Cir. 1983) (age discrimination); *Cartagena* v. *Secretary of the Navy*, 618 F.2d 130 (1st Cir. 1980) (race discrimination); *Sweeney* v. *Bd. of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979) (gender discrimination), *cert. denied*, 444 U.S. 1045 (1980).

[8] *See, e.g., Figueroa Rodríguez* v. *Aquino*, 863 F.2d 1037, 1048-49 (1st Cir. 1988) (Torruella, J., dissenting).

Neither case relied on by the majority, *Addington* v. *Texas*, 441 U.S. 418 (1979), nor *Anderson* v. *Cryovac*, Inc., 862 F.2d 910 (1st Cir. 1988), involved civil rights litigation. Their holdings are completely irrelevant to the present controversy. *Addington* concerns the standard of proof for civil commitment which, because the end result is akin to criminal imprisonment, requires a higher standard of proof than in an ordinary civil case. *Anderson* is equally inapposite. It involves the presumption raised against a party who destroys, the contents of documents which affect that party. Moreover, in *Price Waterhouse* v. *Hopkins*, a Title VII case, the Court said as follows:

> Conventional rules of civil litigation generally apply in Title VII cases, *see, e.g., United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (discrimination not to be "treat[ed]... differently from other ultimate questions of fact"), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. *See, e.g., Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390, 103 S. Ct. 683, 691, 74 L.Ed.2d 548 (1983). Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual. *See Santosky* v. *Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 1396, 71 L.Ed.2d 599 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U.S. 418, 427, 99 S.

> Ct. 1804, 1810, 60 L.Ed.2d 323 (1979) (involuntary commitment); *Woodby* v. *INS*, 385 U.S. 276, 87 S. Ct. 483, 17 L.Ed.2d 362 (1966) (deportation); *Schneiderman* v. *United States*, 320 U.S. 118, 122, 125, 63 S. Ct. 1333, 1335, 1336, 87 L.Ed.2d 1796 (1943) (denaturalization). Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief, *see, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S. Ct. 2997, 3008, 41 L.Ed.2d 789 (1974) (defamation)....
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> Significantly, the cases from this Court that most resemble this one, *Mt. Healthy* and *Transportation Management*, did not require clear and convincing proof. *Mt. Healthy*, 429 U.S., at 287, 97 S. Ct., at 576; *Transportation Management*, 462 U.S., at 400, 403, 103 S. Ct., at 2473, 2475. We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

Price Waterhouse v. *Hopkins*, 109 S. Ct. 1792-93. In a century of civil rights litigation no court has ever proposed the barriers that the majority is today establishing.

But the majority is still not satisfied. Instead, it goes further and adds a new weapon to the public employer's arsenal, the so-called "changeover" defense. This defense "refers to a new administration's claim that challenged actions taken reasonably soon after the 'changeover' in power were designed to advance its First Amendment-related interest in implementing its policies." *Ante* at 23. The majority justifies this new defense on the grounds that "an incoming administration must be given ample room to effect this sort of change without the fear of triggering a multitude of lawsuits by employees whose jobs have changed." *Id.* Lest the government employer be too encumbered by the minor requirement that it carry the burden of proof on this issue, the majority obligingly lightens this burden "by the deference given to" the new administration's claim. *Id.* As expected when judicial alchemy is at work, the majority cites no authority for this new creation.

Lest we lose interest in this mode of creative thinking our attention is called to an "important caveat." *Ante* at 23 n. 10. "Reasonably soon" after the changeover does not necessarily mean what it says, as "an administration ought not to be deprived of a 'reorganization' defense simply because it took place at a relatively late point in its term of office." *Id.* But, we are told, "changes made within days of a new administration's ascent to power ordinarily would be more likely to reflect an improper political housecleaning." *Ante* at 25 n. 12. So, we can say with some "confidence," that the "changeover" defense is available for changes that take place reasonably soon after the changeover in administration, which may mean anytime during the life of the administration, provided it

is not too close to the changeover. It is hard to imagine how government has survived up to now without the benefit of such non-guidelines.

But the "changeover" defense has more to offer. It has a second prong. *Ante* at 24. When faced with this defense, the public employee is caught in the prongs of a dilemma. The second prong skewers *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977). No longer will the government be required to state non-political reasons as the primary motivating factor in dual motive actions against employees, if the action is short of discharge. Employers will be allowed to assume that their politically copesetic subordinates will be more helpful in implementing new policies, *i.e.*, career governmental employees are not to be trusted to comply with their oath of office. As of this were not enough the factfinder must again give "deference" to the government's explanation of its needs in this respect. *Ante* in 24. Again the majority gives no authority for these new standards but requires us to accept them on faith. There is a limit to everything, even faith, and to my view, such unsupported arguments cannot be acceptable when dealing with a subject matter as fundamental as the associational rights of public employees.

The decision reached by this Court today is most unfortunate. It emasculates and downgrades core rights protected by the First Amendment, effectively insulating that most insidious, and difficult to prove, governmental personnel practice: political harassment. It is an unwarranted boon to unscrupulous politicians who will most assuredly take, and use, all the advice which has so generously been given. The best that I can say about this decision is that it runs contrary to the remedial nature of the Civil Rights legislation in question. I dissent.